January 9, 2024

TO: Securities and Exchange Commission

FROM: States of Utah and Kansas; Offices of the Attorney General

RE: Order Instituting Proceedings: "Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the NYSE Listed Company Manual To Adopt Listing Standards for Natural Asset Companies"

File No.: SR–NYSE–2023–09

The Attorneys General for the States of Utah, Kansas, Alabama, Alaska, Arkansas, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wyoming submit the following public comment to the Securities and Exchange Commission ("SEC" or "Commission") in response to its request for comments on whether to approve or disapprove the rule change proposed by the New York Stock Exchange ("Exchange" or "NYSE") titled *Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Amend the NYSE Listed Company Manual To Adopt Listing Standards for Natural Asset Companies,"* 88 Fed Reg. 68,811 (October 4, 2023). The Commission has instituted proceedings to determine whether to approve or disapprove the proposed rule change and requested comments. *See Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the NYSE Listed Company Manual To Adopt Listing Standards for Natural Asset Companies*, 88 Fed. Reg. 89,788 (Dec. 28, 2023).

I. Introduction

On October 24, 1929, now known as "Black Thursday," the rapid sale of 16 million shares of stock by panicked investors precipitated a crash that led to the Great

Depression.[1] At the peak of the Great Depression, 24.9% of the country's workforce was unemployed, and wages fell by 42.5% for those who still had a job.[2] In order to restore the confidence lost in the markets, Congress enacted federal securities laws and created the Commission to enforce such laws.[3] Federal securities statutes like the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") had multiple purposes including, among other things, preventing fraud and promoting disclosure in securities transactions,[4] promoting stability within securities markets as well as the broader economy,[5] restoring public confidence in investing,[6] and helping pull the country out of the Great Depression.[7]

Section 6(b)(5) of the Exchange Act[8] is the authority the NYSE cites in support of its proposed rule change.[9] It states in relevant part:

> An exchange ***shall not*** be registered as a national securities exchange ***unless*** the Commission determines that-
>
> . . . . .
>
> (5) The rules of the exchange are designed to ***prevent fraudulent and manipulative acts and practices***, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, ***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***; ***and*** are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, ***or to regulate by virtue of any authority conferred by***

---

[1] Great Depression Facts, https://www.fdrlibrary.org/great-depression-facts.

[2] *Id.*

[3] *E.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-95 (1976); Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 329-30, 337-52 (1988).

[4] *E.g.*, Preamble to the 1933 Act, Pub. L. No. 73-22, 48 Stat. 74 ("AN ACT To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.").

[5] *E.g.*, 15 U.S.C. § 78b(2)-(4).

[6] *E.g.*, Keller & Gehlmann, *supra* note 3, at 330; *see also* Alfred N. Sacha, *Securities Regulation Reform: Past, Present and Future*, 37 DEPAUL L. REV. 447, 459 & n.99 (1988).

[7] See sources cited in the preceding note.

[8] 15 U.S.C. § 78f(b)(5).

[9] 88 Fed. Reg. 68,811 68,817 (Oct. 4, 2023).

this chapter matters not related to the purposes of this chapter or the administration of the exchange.[10]

The NYSE's proposed rule change runs contrary to this justified purpose and should be disapproved. The NYSE proposes to add to its Listed Company Manual ("Manual") subsection 102.09 "permit[ting] the listing of common equity securities of Natural Asset Companies (or 'NACs')."[11] According to the proposed rule, a NAC is, for the purposes of proposed subsection 102.09, "a corporation whose primary purpose is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services."[12] Notably, the proposed rule characterizes "the distinct purpose of a NAC" as "protect[ing] and grow[ing] the natural assets under its management."[13] The proposed rule also explicitly defines the term "Natural Asset Companies (NACs)" as "[c]orporations that hold the rights to the ecological performance of a defined area and have the authority to manage the areas for conservation, restoration, or sustainable management."[14]

NACs are a concept "pioneered by Intrinsic Exchange Group Inc." ("IEG").[15] According to a September 2021 press release of the Rockefeller Foundation, "IEG was founded in 2017 by entrepreneur and environmentalist, Douglas Eger. IEG received initial funding from IDB Lab and Inter-American Development Bank, The Rockefeller Foundation and Aberdare Ventures and Entertaining Ideas."[16] Notably, the Rockefeller Foundation (which frequently donates significant sums to or otherwise supports left-wing entities[17]) alone granted $750,000 to IEG in 2019[18] and $1 million to IEG in 2021.[19]

---

[10] 15 U.S.C. § 78f(b)(5) (emphasis added).

[11] 88 Fed. Reg. at 68,811.

[12] *Id.*

[13] *Id.* at 68,812.

[14] *Id.* at 68,814.

[15] *Id.* at 68,812.

[16] Press Release, The Rockefeller Foundation, NYSE And Intrinsic Exchange Group Partner to Launch A New Asset Class to Power a Sustainable Future (Sept. 14, 2021) ["Rockefeller Press Release"], https://www.rockefellerfoundation.org/news/nyse-and-intrinsic-exchange-group-partner-to-launch-a-new-asset-class-to-power-a-sustainable-future/.

[17] *E.g.*, American Civil Liberties Union Foundation, https://www.rockefellerfoundation.org/grant/grant-2020-121/ ($250,000); Bill, Hillary & Chelsea Clinton Foundation, https://www.rockefellerfoundation.org/grant/bill-hillary-chelsea-clinton-foundation-2023/ ($200,000); Brookings Institution 2021, https://www.rockefellerfoundation.org/grant/brookings-institution-2021-7/ ($500,000); Human Rights Campaign Foundation, https://www.rockefellerfoundation.org/grant/human-rights-campaign-foundation-2021-4/ ($175,000);

[18] https://www.rockefellerfoundation.org/grant/grant-intrinsic-value-exchange-inc-2019-2/.

[19] https://www.rockefellerfoundation.org/grant/the-intrinsic-exchange-group-inc-2021/.

The Rockefeller Foundation's press release indicates that NACs are a joint project of the NYSE and IEG.[20] The release quotes Eger as follows:

> "This new asset class on the NYSE will create a virtuous cycle of investment in nature that will help finance sustainable development for communities, companies, and countries[.] . . . ***Together, IEG and the NYSE*** will enable investors to access nature's store of wealth and transform our industrial economy into one that is more equitable."[21]

The release quotes the NYSE Group's then-president Stacey Cunningham as follows:

> "With the introduction of Natural Asset Companies, the NYSE will provide investors an innovative mechanism to financially support the sustainability initiatives they deem critical to our future. ***Our partnership*** with Intrinsic Exchange Group is another example of the NYSE tapping into our community to drive meaningful progress on ESG issues with a solutions-based approach[.]"[22]

Notably, terms or phrases like "communities," "community," "equitable," "ESG," "our future," "sustainability," "sustainable," "sustainable development," "transform," and "virtuous" are nowhere defined in either the Rockefeller Foundation's press release[23] or the proposed rule.[24] Also notable, the release admits that "the value created by NACs is not fully captured by traditional economic metrics."[25] In other words, NACs will not and cannot make a profit. NACs will invest in "nature" where the only value created is the purported protection of nature.

The Commission has instituted proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether to approve or disapprove the proposed rule change.[26] The undersigned Attorneys General strongly urge the Commission to disapprove it.

---

[20] Rockefeller Press Release, *supra* note 16 ("[NYSE] . . . and [IEG] . . . announced today that they are jointly developing a new class of publicly traded assets called Natural Asset Companies, or NACs.").
[21] *Id*. (emphasis added).
[22] *Id*. (emphasis added).
[23] *See id*.
[24] *See* 88 Fed. Reg. at 68,811-19.
[25] Rockefeller Press Release, *supra* note 16.
[26] 88 Fed. Reg. 89,788 (Dec. 28, 2023).

II. The proposed rule is contrary to law because it is designed to facilitate another agency's unlawful activity.

Under the current NYSE's Manual Section 102.00, NACs are not listed as a type of company.[27] Moreover, there is no reference to NACs anywhere else in the current Manual.[28] This is likely because the creation of NACs seems to contradict the NYSE's own manual. Thus, if it approves the NYSE's proposal, the Commission will have effectively enabled the NYSE, the most well-known and influential stock exchange on earth,[29] to authorize the existence of entities that could ultimately be used to subordinate the interests of millions of Americans to the aims of environmental activists as well as to United Nations policies and mandates.[30] This would violate the text and purposes of federal securities laws, the Administrative Procedure Act, and the U.S. Constitution.

The proposed rule plainly is intended to serve as the funding mechanism for the Bureau of Land Management's ("BLM's") recent proposed rule, "Conservation and Landscape Health," which would authorize BLM to grant "conservation leases" for public lands.[31] Such leases would be "for the purpose of ensuring ecosystem resilience through protecting, managing, or restoring natural environments, cultural or historic resources, and ecological communities, including species and their habitats."[32] The BLM rule provides that "once the BLM has issued a conservation lease, the BLM *shall not authorize any other uses of the leased lands* that are inconsistent with the authorized conservation use."[33] This means that once BLM issues a conservation lease, productive economic uses such as grazing, logging, or mining will no longer be allowed unless they are "consistent" with the lease's environmental purposes.

As many of the undersigned States explained in comments on the BLM rule, the rule "is an astonishing attempt to create agency authority where none exists."[34] The

---

[27] NYSE Listed Company Manual § 102.00, https://nyseguide.srorules.com/listed-company-manual.

[28] *See id.*

[29] *See* Rockefeller Press Release, *supra* note 16 ("NYSE Group's equity exchanges — the New York Stock Exchange, NYSE American, NYSE Arca, NYSE Chicago and NYSE National — trade more U.S. equity volume than any other exchange group. The NYSE is the premier global venue for capital raising.").

[30] For example, the "NYSE proposes to . . . requir[e] NACs to adopt and publish an Environmental and Social Policy, a Biodiversity Policy, [and] a Human Rights Policy, consistent with the United Nations Guiding Principles on Business and Human Rights[.]" 88 Fed. Reg. at 68,813.

[31] 88 Fed. Reg. 19,583, 19,600 (Apr. 3, 2023).

[32] *Id.*

[33] *Id.* (emphasis added).

[34] Letter from Nine State Attorneys General to Bureau of Land Mgmt. (June 20, 2023), *available at* https://attorneygeneral.utah.gov/wp-content/uploads/2023/07/20230705_AG_comments_on_BLM_proposed_rule.pdf.

Federal Land Policy and Management Act ("FLPMA") mandates that BLM manage public lands "on the basis of multiple use and sustained yield."[35] This means the agency must provide for a "combination" of uses that "achieve[]" and "maintain[]" a "high-level annual or regular periodic output of the various renewable resources" on subject lands.[36] "[P]rincipal or major uses" include, "and [are] *limited* to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."[37] Nothing in FLMPA authorizes the granting of "conservation leases," and the BLM rule's restrictions on productive economic uses for lands under such a lease "squarely contradict[] the FLPMA's multiple use and sustained yield policy and congressional intent."[38]

Left unspoken in the BLM rule is where the money for these "conservation leases" will come from. Such leases will not provide financial returns for leaseholders. To the contrary, their entire purpose is to lock up lands to prohibit productive economic uses thereof. So where will the money come from? Or stated differently, who are the entities or organizations that will sink money into these unprofitable leases?

The answer is NACs. As explained, a NAC is "a corporation whose primary purpose is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services."[39] NACs are not intended to make money. Indeed, NACs are strictly limited in their ability to conduct "revenue-generating operations" at all.[40] They are allowed to do so *only* if a revenue-generating operation is "consistent with" the NAC's "primary purpose" and *only* if the operation will "not cause any material adverse impact on the natural assets" under the NAC's control.[41] Hence the need for the IEG reporting framework, which allows NACs to highlight the supposed "non-monetized" value of their "ecosystem services" over actual financial metrics.[42]

---

[35] 43 U.S.C. § 1701(7) *et seq.*

[36] *Id.* § 1702(c), (h).

[37] *Id.* § 1702(*l*) (emphasis added).

[38] Letter from Nine State Attorneys General to Bureau of Land Mgmt., *supra* note 33. The BLM rule and NYSE's proposed rule change also appear to conflict with statutory policies set forth in the Mineral Leasing Act, *see* 30 U.S.C. § 226(b)(1)(A) (providing that lease sales for federal lands known or believed to contain oil or gas deposits "shall be held for each State where eligible lands are available at least quarterly"), and Outer Continental Shelf Lands Act, *see* 43 U.S.C. § 1332(3) (providing that the outer continental shelf "should be made available for expeditious and orderly development"). For this reason, too, the proposed rule change is contrary to law.

[39] 88 Fed. Reg. at 68,611.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 68,814.

By authorizing the NYSE to list NACs on its exchange, the proposed rule provides a mechanism for companies whose purpose is not to make money, but instead to lock up land to prohibit productive economic uses thereof, to find investors and capital so they can obtain conservation leases and other "ecological performance rights." It functions in unison with the BLM rule. The BLM rule authorizes BLM to issue leases that limit public lands to no use or to only extremely limited uses. The NYSE's proposed rule change in turn provides the mechanism by which companies can obtain the funding necessary to pay for those money-losing leases. In this way, the proposed rule is part of an interlocking scheme designed to facilitate another agency's violation of the law—namely, BLM's issuance of illegal "conservation leases." Facilitating another agency's legal violations is a textbook example of *ultra vires* agency action "not in accordance with law."[43]

Furthermore, to the extent NACs control management of the lands entrusted to the BLM or another federal agency, the proposed rule constitutes an unconstitutional non-delegation problem. Under the private non-delegation doctrine, "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Nat'l Horsemen's Benevolent & Prot. Ass'n v. Black*, 53 F.4th 869, 881 (5th Cir. 2022). Here, the proposed rule specifically contemplates that NACs will "hold the rights to the ecological performance of a defined area and have the authority to manage the areas for conservation, restoration, or sustainable management."[44] Thus, the proposed rule facilitates both the BLM's unlawful issuance of leases and the delegation of management to private actors.

III. The proposed rule exceeds the Commission's statutory authority and is inconsistent with the requirements of the Exchange Act.

Like all federal agencies, the Commission has "only those authorities conferred upon it by Congress."[45] The Commission "'literally has no power to act' . . . unless and until Congress authorizes it to do so by statute."[46] When the Commission acts in excess of its statutory authority, its actions are "plainly contrary to law and cannot stand."[47]

---

[43] 5 U.S.C. § 706(2)(A).

[44] 88 Fed. Reg. at 68,814.

[45] *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007).

[46] *FEC v. Cruz*, 596 U.S. 289, 301 (2022) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

[47] *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002); *see also* 5 U.S.C. § 706(2) (directing reviewing courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations").

The proposed rule exceeds the Commission's statutory authority in at least two ways. First, the Commission's authority to approve proposed rule changes by self-regulatory organizations such as the NYSE is limited to rules that protect investors and the public interest. But the rule does not protect investors and the public interest. It does the opposite. Second, the Commission's approval authority is limited to rules that do not seek to regulate matters unrelated to the purposes of the Exchange Act. The rule, however, attempts to regulate matters far beyond the scope of the Act. Thus, the rule is "plainly contrary to law and cannot stand."[48] For these same reasons, the proposed rule is also inconsistent with the requirements of the Exchange Act.[49]

The proposed rule cites Section 6(b)(5) of the Act as the "statutory basis" for the Commission's approval of the NYSE NAC listing standards.[50] That section provides that to be registered as a "national securities exchange," an exchange must have rules that, *inter alia*, "protect investors and the public interest" and are "not designed . . . to regulate . . . matters not related to the purposes of [the Act]."[51] Section 19(b), which the proposed rule cites elsewhere,[52] further provides that when a "self-regulatory organization" such as a national securities exchange[53] seeks approval from the Commission for a proposed rule change, the Commission shall approve the change only if it "is consistent with the requirements of [the Act]."[54]

Read together, these provisions limit the Commission's approval authority to rule changes that "protect investors and the public interest" and that avoid regulating matters "not related to the purposes of the" Securities Exchange Act.[55] Stated differently, the Commission lacks authority to approve rule changes that fail to protect investors and the public interest and that are designed to regulate matters unrelated to the purposes of the Securities Exchange Act. The proposed rule change does both. It is therefore inconsistent with the requirements of the Exchange Act.

---

[48] *ExxonMobil Gas Marketing Co.*, 297 F.3d at 1088.

[49] *See* 88 Fed. Reg. at 89,795 (requesting comments on the proposed rule's "consistency with applicable statutory requirements," including section 6(b)(5) of the Exchange Act).

[50] *See id.* at 68,817.

[51] 15 U.S.C. § 78f(b)(5).

[52] *See* 88 Fed. Reg. at 68,811, 68,819.

[53] *See* 15 U.S.C. § 78c(a)(26)

[54] *Id.* § 78s(b)(2)(C)(i); *see also id.* § 78s(b)(2)(C)(ii) (providing that the Commission shall disapprove a proposed rule change if the change is not consistent with the requirements of the Act).

[55] *Id.* § 78f(b)(5).

A. The proposed rule change does not protect investors and the public interest.

First, the proposed rule change does not protect investors and the public interest. To the contrary, it threatens substantial harm on multiple fronts. To start, as explained above, the proposed rule is part of an interlocking scheme with the recent proposed BLM rule to facilitate BLM actions that are contrary to law. Enabling another agency's violation of the law is not in the public interest.[56]

Next, the rule will enable private entities to lock up public lands in perpetuity, thereby depriving access to such lands for recreational purposes and for valuable—and in some cases essential—economic activities.[57] This includes agriculture, grazing, mining, logging, fossil fuel extraction, and any other activity that "extract[s] resources without replenishing them."[58] Enabling private actors to cut off productive economic uses for public lands in perpetuity is not in the public interest.

And unlike federal and state governments, which are required to administer public lands for the benefit of the public, these private entities will be beholden to *private* interests such as shareholders and creditors. It is not in the public interest to facilitate a massive corporate takeover of public lands by private actors who owe no duty to the public and who are guided by their own financial and political interests. Yet that is precisely what the proposed rule does.

Even more alarming, the proposed rule will enable *foreign* actors to obtain perpetual control over public lands, either directly through organizing and registering as NACs or through obtaining controlling interests in NACs. This raises serious national security concerns, particularly given the importance of energy production and natural resource availability to America's geopolitical position. To cite just one example, rare earth minerals have become increasingly important in the manufacture of high-tech electronics and are a key component of modern defense technology.[59] Ensuring a steady supply chain for such minerals is crucial to America's military readiness.[60] Yet the

---

[56] *See Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) ("[T]he public interest is in having governmental agencies abide by the federal laws that govern their existence and operations." (cleaned up)).

[57] *See* 88 Fed. Reg. at 68,815 (noting expectation "that most license agreements" for ecological performance rights "will have terms significantly longer than ten years" and will "in some cases . . . be perpetual").

[58] *Id.* at 68,818.

[59] *See, e.g.*, Am. Geosciences Inst., *What are rare earth elements, and why are they important?*, https://www.americangeosciences.org/critical-issues/faq/what-are-rare-earth-elements-and-why-are-they-important.

[60] *See* Samantha Subin, *The new U.S. plan to rival China and end cornering of market in rare earth minerals*, CNBC (Apr. 17, 2021), https://www.cnbc.com/2021/04/17/the-new-us-plan-to-rival-chinas-dominance-in-rare-earth-metals.html.

proposed rule will enable foreign actors—including actors who may have goals directly contrary to America's national security interests—to close off public lands for exploration and extraction of rare earth minerals. In this way as well, the proposed rule is contrary to the public interest.[61]

Nor does the proposed rule protect investors. The rule recognizes that NACs are unlikely to generate "value" for investors under traditional accounting principles because the "ecosystem services" NACs provide are "non-monetized."[62] Thus, the rule requires NACs to use a "proprietary" reporting framework developed by IEG to "capture the value of the non-monetized" services.[63] This is an admission that the Commission does not expect NACs to generate monetary returns for investors, because why else come up with a reporting framework to measure other "value"? Indeed, it is likely that many NACs will not generate any revenue at all. As the proposed rule recognizes, "the *primary* purpose" of a NAC "is to actively manage, restore (where applicable), and grow the value of natural assets," and a NAC may "seek to conduct sustainable revenue-generating operations" only "where doing so is consistent with" that primary purpose.[64]

Use of a novel and unproven proprietary framework to value "ecosystem services" and "natural assets,"[65]—terms nowhere defined in the proposed rule—in lieu of traditional investment measures does not protect investors. To the contrary, it is a recipe for investment decisions based on guesswork and buzzwords.[66] Even worse, built into the very structure of the proposed rule are two clear conflicts of interest. First, "IEG

---

[61] In response to concerns similar to those outlined in the above paragraph, a number of states have proposed or enacted laws restricting ownership of land by foreign entities. *See, e.g.*, S.B. 100 (Kan. 2023), https://kslegislature.org/li/b2023_24/measures/sb100/; H.B. 2397 (Kan. 2023), https://kslegislature.org/li/b2023_24/measures/hb2397/; H.B. 186, 2023 Gen. Sess. (Utah 2023), https://le.utah.gov/~2023/bills/hbillenr/HB0186.pdf.

[62] 88 Fed. Reg. at 68,814.

[63] *Id.* at 68,812, 68,814.

[64] *Id.* at 68,811 (emphasis added).

[65] *Id.* at 68,813.

[66] *See* Comment of Justin Bis, Fin. Fairness All., File No. SR-NYSE-2023-09, *Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies* (Oct. 25, 2023), https://www.sec.gov/comments/sr-nyse-2023-09/srnyse202309-281279-687203.pdf (explaining that the proposed rule creates "new accounting standards to try to create the illusion of economic value where none exists under GAAP or IFRS"); *cf.* Sanjai Bhagat & R. Glenn Hubbard, *Should the Modern Corporation Maximize Shareholder Value?*, The CLS Blue Sky Blog (May 18, 2020), https://clsbluesky.law.columbia.edu/2020/05/18/should-the-modern-corporation-maximize-shareholder-value ("[A]ltering the purpose of the corporation away from long-term shareholder value maximization risks vagueness that can disrupt the wealth-producing and job-creating power we take for granted from the modern corporate enterprise.").

will be entitled to a share of the revenues generated by" NYSE "from the listing and trading of NACs on the NYSE."[67] Thus, the more NACs that form and request to be listed on the NYSE, the more money IEG will make. IEG has a direct financial interest in pushing for the creation and listing of NACs whose true value is effectively impossible for investors to understand. Second, the NYSE has acquired a minority ownership interest in IEG and a seat on IEG's board of directors.[68] The NYSE also will have a direct financial interest in steering investors to this novel, opaque, non-monetized investment vehicle. Approving new listing standards with such obvious conflicts of interest does not protect investors.

B. The proposed rule change is designed to regulate matters unrelated to the purposes of the Exchange Act.

The proposed rule change is also designed to regulate matters unrelated to the purposes of the Exchange Act. The central purpose of the Act is "to insure the maintenance of fair and honest markets in [securities] transactions."[69] It seeks to "remove impediments to and perfect the mechanisms of a national market system for securities," "impose requirements necessary to make such regulation and control reasonably complete and effective," and "protect and make more effective the national banking system and Federal Reserve System."[70] As the Supreme Court has explained, the Act is "designed to protect investors against manipulation of stock prices" and does so through "implementing a 'philosophy of full disclosure.'"[71]

The proposed rule seeks to regulate matters far beyond these statutory purposes. The Commission openly admits that the purpose of the rule is to "end[] the overconsumption of and underinvestment in nature" through "bringing natural assets into the financial mainstream."[72] It seeks to plug what it calls a $5 trillion-plus "financing gap" for "biodiversity" and "climate change" by enabling NACs to list on the NYSE and "present the economic case" for "biodiversity conservation, renewable energy, regenerative agriculture, and other direct investments" through the new IEG reporting

---

[67] 88 Fed. Reg. at 68,813.

[68] *See id.*

[69] 15 U.S.C. § 78b.

[70] *Id.*

[71] *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-78 (1977)). The proposed rule's endorsement of an unproven proprietary reporting framework in lieu of traditional investment measures, *see supra*, runs directly contrary to this statutory purpose. For this reason too the proposed rule is contrary to law.

[72] 88 Fed. Reg. at 68,6812.

framework. *Id.* Doing so, the Commission says, will facilitate "the transition to a more sustainable, resilient, and equitable economy."[73]

These matters are not related to the Exchange Act's purposes of ensuring fair and honest securities markets and protecting investors against manipulation of stock prices. Ending the supposed "overconsumption" of natural assets has nothing to do with ensuring investors receive accurate information so they can make informed investment decisions. Similarly, plugging a purported "financing gap" goes far beyond the Commission's statutory mandate to ensure an effective, well-functioning securities market. It is not the Commission's role to seek to remedy what it perceives to be underinvestment in certain asset classes or lead the way toward what the Commission thinks will be more "sustainable" investment decisions.

The Commission's job, per the express terms of the Exchange Act, is "to insure the maintenance of fair and honest markets in [securities] transactions."[74] Social engineering and environmental advocacy are not related to that statutory mandate. Because the proposed rule change is designed to regulate matters far beyond the Act's purposes, it exceeds the Commission's statutory authority. It is also inconsistent with the requirements of the Exchange Act.

IV. Allowing NACs to be listed would violate the major questions doctrine because Congress did not explicitly authorize the NYSE or the SEC to create a new class of security aimed at primarily environmental purposes purportedly worth trillions of dollars.

Listing NACs and allowing them to be traded would have vast negative economic ramifications for the U.S. economy, costing hundreds of billions, if not trillions, of dollars. The proposed rule itself admits as much. Specifically, the rule asserts not only that there is a "financing gap" of between $500 and $800 billion per year for "biodiversity" but, beyond that, that there is a "financing gap" of over $5 trillion per year for "climate change."[75] In addition, the proposed rule asserts that "ecosystem services" are valued at more than $100 trillion *per year* and indicates an intention to capture that value.[76] The economic impact of this proposed rule is breathtaking. (And again, while the Rule would direct hundreds of millions of investors' money into these assets, they would not generate any money for investors.)

---

[73] *Id.*

[74] 15 U.S.C. § 78b.

[75] 88 Fed. Reg. at 68,812.

[76] *Id.* at 68,811-12.

As the Supreme Court held in *West Virginia v. EPA*,[77] "in extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [courts] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there"; an "agency must point to clear congressional authorization for the power that it claims."[78] Extraordinary cases include ones that involve "decisions of vast economic and political significance."[79]

The reason that the SEC exists in the first place is to regulate markets by preventing fraudulent and manipulative practices in an effort to prevent anything like the crash of 1929. Nowhere does the Exchange Act, including Section 6(b)(5) (which the NYSE cites as its authority), authorize a new class of security aimed primarily at environmental ends rather than economic ones. It is the NYSE and Commission's burden to demonstrate that Congress has authorized national securities exchanges to assume the role of environmental remediator. But the Commission simply cannot do this.

What is happening here is clear. The Commission and the NYSE are seeking to implement a radical environmental agenda through the rulemaking process (and outside the legislative process). Something of this magnitude must be approved by Congress or, at minimum, explicitly authorized by statute. The proposed rule does not even attempt to demonstrate that either of those things is true here. This type of decision, particularly given its vast economic consequences, must be left to Congress and not the Commission or the NYSE.

V. NACs are just plain bad policy.

Beyond being unlawful, the NYSE's proposal is bad policy that will harm the economy and endanger our national security. It facilitates another agency's violations of the law. It will enable private entities to lock up public lands in perpetuity, eliminating access to such lands for recreational purposes and essential economic activities. It will enable foreign actors—some of whom may have goals directly contrary to America's national security interests—to gain perpetual control over public lands and close off desperately needed natural resource development. And it fails to protect investors by blessing an unproven, proprietary reporting framework that will confuse investors and distract attention from the unprofitability of NACs while simultaneously lining the pockets of IEG and the NYSE.

---

[77] 142 S. Ct. 2587 (2022).

[78] *Id.* at 2609 (citations and internal quotation marks omitted).

[79] *Id.* at 2616 (Gorsuch, J. concurring) (internal quotation marks omitted).

The proposed rule is clearly intended to prevent oil and mineral extraction from occurring on public lands[80] and, instead, put such lands to no productive use.[81] Although it pays lip service to nebulous (allegedly) economic uses such as "ecotourism" and "production of regenerative food crops,"[82] the proposed rule provides no evidence that such uses will be remotely profitable. If the proposed rule takes effect, there will be large swaths of lands that would be of no economic value. The only value to be realized from this proposal will be from the trading of shares of NACs on the market. Given that there is essentially no economic value to support a NAC's market price,[83] this proposal will have the likely effect of creating a bubble that would eventually burst and damage the wider economy.

The national security implications are also breathtaking. Foreign ownership of American land by hostile nations such as China (which is controlled by a communist party[84]) is already creating problems for the country. According to some estimates, Chinese entities already own approximately 380,000 acres of agricultural land in the United States.[85] Some of this land is near our military installations.[86] To combat this, states (including some of the undersigned ones) have either enacted or are considering limiting foreign ownership of state land by legislative or other means.[87]

Unfortunately, nothing in this proposed rule prohibits or would even prevent foreign control of NACs. It is easy to see how an adversary nation could use NACs to effectively take control of our nation's natural resources and federal land. Yet the Commission and the NYSE have decided to prioritize the radical climate agenda of the United Nations over the security and sovereignty of our nation. This is wrong and must not be allowed to happen.

---

[80] *See, e.g.*, 88 Fed. Reg. at 68,814 (listing "Charter" among the corporate documents a NAC must have, explaining what the types of provisions a charter must have, and explaining that one of the provisions is a prohibition on "engaging directly or indirectly in unsustainable activities" which "are . . . activities . . . that extract resources without replenishing them (including, but not limited to, *traditional fossil fuel development*, mining, unsustainable logging, or perpetuating industrial agriculture)" (emphasis added)).

[81] *See supra* note 25 and accompanying text.

[82] 88 Fed. Reg. at 68,812.

[83] *See supra* note 25 and accompanying text.

[84] *E.g.*, Virginia Allen, *After Facing Torture From Chinese Communist Party, Uyghur Muslim Shares Her Story and Calls for Action*, The Daily Signal (Mar. 23, 2023), https://www.dailysignal.com/2023/03/23/after-facing-torture-from-chinese-communist-party-uyghur-muslim-share-her-story-and-calls-for-action/.

[85] https://www.npr.org/2023/06/26/1184053690/chinese-owned-farmland-united-states.

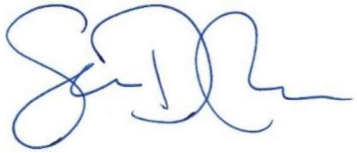
[86] *Id.*

[87] *E.g.*, S.B. 100 (Kan. 2023), https://kslegislature.org/li/b2023_24/measures/sb100/; H.B. 2397 (Kan. 2023), https://kslegislature.org/li/b2023_24/measures/hb2397/; H.B. 186, 2023 Gen. Sess. (Utah 2023), https://le.utah.gov/~2023/bills/hbillenr/HB0186.pdf.

VI. Conclusion

The Commission has prudently chosen to institute proceedings to determine whether to disapprove the NYSE's proposed rule change rather than immediately approving it. The undersigned Attorneys General appreciate the opportunity to provide input prior to such a decision. The choice in front of the Commission is a clear one as the NYSE proposed rule is both unlawful and bad policy. As such, the Commission should disapprove it. The undersigned states request the opportunity to make an oral presentation on this matter to the Commission.

Sincerely,



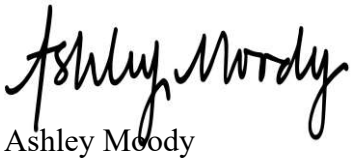
Sean D. Reyes
Utah Attorney General

Kris W. Kobach
Kansas Attorney General

Steve Marshall
Alabama Attorney General

Treg R. Taylor
Alaska Attorney General

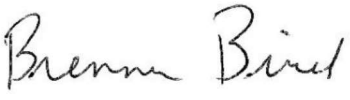
Tim Griffin
Arkansas Attorney General



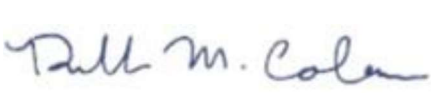
Ashley Moody
Florida Attorney General

Raúl Labrador
Idaho Attorney General

Todd Rokita
Indiana Attorney General

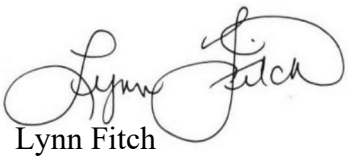


Brenna Bird
Iowa Attorney General



Russell Coleman
Kentucky Attorney General

Liz Murrill
Louisiana Attorney General



Lynn Fitch
Mississippi
Attorney General

Andrew Bailey
Missouri Attorney General

Austin Knudsen
Montana Attorney General

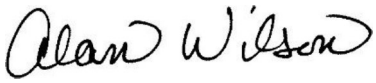
Mike Hilgers
Nebraska Attorney General

John Formella
New Hampshire
Attorney General

Drew Wrigley
North Dakota
Attorney General

Dave Yost
Ohio Attorney General

Gentner F. Drummond
Oklahoma Attorney General



Alan Wilson
South Carolina
Attorney General

Jonathan Skrmetti
Tennessee Attorney General

Ken Paxton
Texas Attorney General

Jason S. Miyares
Virginia Attorney General

Patrick Morrisey
West Virginia
Attorney General

Bridget Hill
Wyoming Attorney General