



October 25, 2023

Submitted via rule-comments@sec.gov

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

Re: Notice of Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies; SR-NYSE-2023-09

Dear Secretary Countryman:

I submit this public comment on behalf of the Financial Fairness Alliance, a new organization that believes markets must work for all Americans, not just large special interests. Too often, these interests seek to change well-established rules that ensure capital markets function properly and fairly for the purpose of self-enrichment. FFA exists to shine a light on such conduct and its respective allies.

When reviewing a rule of a self-regulatory organization, securities law requires the Securities and Exchange Commission (SEC) to determine whether the action is in the public interest, for the protection of investors, and whether the action will promote capital formation.¹ In addition, the SEC must reject a proposed rule of a self-regulatory organization if such rule is not consistent with the purposes of securities law.² Applying these standards to the New York Stock Exchange, LLC's (NYSE) "Notice of Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies" (the "Proposal," Release No. 34-98665; File No. SR-NYSE-2023-09) it quickly becomes apparent why the SEC must reject the Proposed Rule. Accordingly, the Financial Fairness Alliance (FFA) opposes the Proposal on the following grounds:

¹ See, e.g. 15 U.S.C. 78c(f) ("Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."). See also 15 U.S.C. 77b(b); 15 U.S.C. 80a-2(c).

² See 15 U.S.C. 78s(b)(2)(c)(i) and (ii) ("The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization. . . . The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make a finding described in clause (i).")

Background

NYSE proposes to amend the NYSE Listed Company Manual (“Manual”) to adopt a new listing standard for the listing of “Natural Asset Companies” (“NAC”). The Proposal defines a NAC as:

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. In addition, where doing so is consistent with the company’s primary purpose, the company will seek to conduct sustainable revenue-generating operations. Sustainable operations are those activities that do not cause any material adverse impact on the condition of the natural assets under a NAC’s control and that seek to replenish the natural resources being used. The NAC may also engage in other activities that support community well-being, provided such activities are sustainable.

The Proposal also states:

For purposes of this proposal, the term ‘ecosystem’ refers to specific entities (structures, functions, and components of the natural world) that produce ecosystem services. These and other benefits derived from ecosystems are called ecosystem services, and in aggregate, economists estimate their value at more than US \$100 trillion dollars per year. Examples of ecosystem services include clean air, water supply, flood protection, productive soils for agriculture, climate stability, habitat for wildlife, among others (footnotes omitted). . . capital raised through an NYSE-listed NAC’s initial public offering or follow-on offerings must be used to implement the conservation, restoration, or sustainable management plans articulated in its prospectus, fund its ongoing operations, or otherwise fulfill its purpose to maximize ecological performance (i.e., the value of natural assets and the production of ecosystem services).”

Under the Proposal NACs are tasked with the acquisition of rights of use to public and private lands including parks, forests, waters and farms. However, NACs are “prohibited from directly or indirectly conducting unsustainable activities, such as mining, that lead to the degradation of the ecosystems it is trying to protect.”³

³ Under the Proposal a NAC could acquire the exclusive right to farm land in the American Midwest but would be prohibited from maintaining current, high-yield, “unsustainable” farming practices. Instead, the NAC could turn the farmland over to disadvantaged local communities that promise to use only organic and “sustainable” farming practices. Whatever the social benefits of such a policy might be they will not increase the actual productive value of the farmland, which is demonstrably less than under “industrial farming.” See e.g. Lauren C. Ponsio et. al., “Diversification Practices Reduce Organic to Conventional Yield Gap,” The Royal Society Publishing, Jan. 22, 2015, <https://doi.org/10.1098/rspb.2014.1396>. Thus, under the

The drafters of the Proposal apparently recognize the challenge of attempting to provide investors with sufficient information to allow them to make an informed decision with respect to how these undevelopable “assets” can contain value. The Proposal states “(b)ecause of the distinct purpose of a NAC (to protect and grow the natural assets under its management), NYSE proposes to require NACs to publish on a periodic basis information on the ecological performance of the natural assets licensed to a NAC. This information will be presented in an Ecological Performance Report (an “EPR”).”

The Proposal purports to create a novel way to measure the value of these services and assets, by reference to a set of accounting standards. But these standards are not recognized under Generally Accepted Accounting Principles (GAAP) nor elsewhere else in U.S. law. As the NYSE boldly notes, “a NAC’s activities are not well captured solely by traditional financial reporting standards like GAAP/IFRS..” Thus, in an attempt to create values not captured in established accounting regimes, a NAC must also follow the reporting framework created by the Intrinsic Exchange Group Inc. (“IEG”). Perhaps not coincidentally, IEG is the same entity that created the NAC concept, and with whom the NYSE has entered into a commercial partnership to profit from the NAC concept.⁴

Under the IEG’s Ecological Performance Reporting Framework (the “Framework”) NACs will purportedly inform the investing public about the “value” of the non-producing assets they hold. The Framework is based on the natural capital accounting standards established in the “United Nations System of Environmental- Economic Accounting – Ecosystem Accounting Framework.” The Framework thus claims to capture the economic value of such things as “community well-being” and “ecological performance.”

Objections

1. NACs are vehicles for fraud.

It should be readily apparent that an investment vehicle that proposes to take investor money, use it to acquire assets that cannot be used in tangible ways to create

Proposal, a NAC is required to take assets with a currently demonstrable economic value and reduce that value under current known and approved economic measures.

⁴ NYSE and IEG have entered into an agreement pursuant to which IEG has granted the Exchange an exclusive license in the United States to use the Reporting Framework in connection with the listing of NACs on the New York Stock Exchange (although the Reporting Framework will remain proprietary to IEG). Under the terms of the agreement, NYSE has acquired a small minority interest in IEG and one seat on IEG’s board of directors. IEG has agreed to seek to identify and develop NACs for listing on the Exchange, in addition to marketing the listing and trading of NACs on the Exchange and providing training with respect to the NAC structure and the Reporting Framework to NYSE personnel and currently listed and potential listed NACs. IEG will be entitled to a share of the revenues generated by the Exchange from the listing and trading of NACs on the NYSE. Securities and Exchange Commission, “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,” sec.gov, Sept. 29, 2023, 8, <https://www.sec.gov/files/rules/sro/nyse/2023/34-98665.pdf>. (the “Release”).

economic value, and thus are to be valued using completely novel and untested accounting methods designed expressly for the purpose of attributing value where none exists under traditional accounting methods, is a fraud. The point does not need to be belabored: NACs are designed to take investor money and use it to lock up assets that cannot be used in the way they create value, such as through cattle ranching or mining. Clean air, for example, does not have an economic value in the way that cows or minerals have. Thus, whatever else a NAC might be, it is not a business since a NACs business model is based exclusively on taking money from investors and not creating or obtaining anything of economic value as currently conceived under the securities laws. A business that claims to be for-profit when it is clearly a social welfare non-profit company is a deception to the investing public. Creating new accounting standards to try to create the illusion of economic value where none exists under GAAP or IFRS at least has the benefit of making this fact apparent. The NYSE is a national securities exchange regulated by the SEC. As such it is responsible for ensuring that the “rules of the exchange are designed to prevent fraudulent and manipulative acts and practices.”⁵ The SEC must reject the Proposal as patently inconsistent with the securities laws.

2. The Proposal raises national security concerns

Under the proposal “NACs are expected to license (rights to natural resources) from sovereign nations or private landowners.”⁶ These rights can include such vital resources as the ability to grow food or mine for critical minerals. In addition, some of these rights may grant the NAC access to or even control of lands located near sensitive U.S. government facilities. There is nothing in the Proposal to prevent a hostile foreign power from sponsoring or subsequently acquiring a controlling interest in a NAC, at which point the foreign power may have the ability, or indeed, the responsibility, to prevent productive use of America’s natural resources, or access to sensitive lands.

The Defense Production Act of 1950 authorizes the President to suspend or negate certain transactions involving foreign-owned or controlled entities, which the President has vested in the Committee on Foreign Investment in the United States (CFIUS).⁷ Although any foreign control or acquisition of a NAC would potentially trigger CFIUS review, these reviews can be lengthy and post-hoc, by which time serious damage could have been done to America’s interests. For this reason, the SEC should not approve the Proposal until CFIUS has had the opportunity to review and provide comment.

3. The NYSE has an inherent conflict of interest

The NYSE is owned by the InterContinental Exchange (ICE), which is itself listed on the NYSE.⁸ As a publicly traded company ICE is required, per the rules of the NYSE, to

⁵ 15 U.S.C. 78f(b)(5)

⁶ Release 5.

⁷ 50 U.S.C. 4565.

⁸ “In the early 2000s, changes occurred across the NYSE. On November 16, 2005, Intercontinental Exchange (NYSE: ICE) listed on the NYSE. In 2006, the New York Stock

adhere with the NYSE’s “Listed Company Manual” (the “Manual,”) which outlines the requirements for entities to be eligible for listing on the New York Stock Exchange (“Exchange”).⁹ Among other things the Manual requires companies to adopt a Code of Business Conduct and Ethics, which itself requires companies to adopt policies prohibiting conflicts of interest.¹⁰

ICE’s own Global Code Business Conduct notes “having an ownership or other financial interest in one of ICE’s competitors, customers, or suppliers could create a divided loyalty” and must be disclosed so that “the conflict can be addressed appropriately.”¹¹ In the Proposal NYSE discloses its ownership interest in the NAC sponsor IEG and the exclusive license it holds to promote the listing of NACs on the NYSE.¹² However NYSE does not address how it will manage the inherent conflict in having an ownership interest in the sponsor of these novel organizations, nor how it will enforce its self-regulatory obligations to police conflicts of interest against ICE, which is both a listed company and NYSE’s owner.

The inherent conflicts in this tangled web of relationships would be complicated enough if NACs were for-profit businesses with clear plans to monetize their assets. In the present case the NYSE/ICE is claiming the ability to help promote the creation of new types of entities, profit from the gullibility of the investing public, and police itself in the event investors raise questions about the dubiousness of the endeavor. The SEC cannot approve the proposed rule until the NYSE has provided a clear path as to how it intends to manage the conflict of interest among itself, ICE, and the NACs all stemming from the final salient point, addressed below.

4. There is no need for a new rule

The last point is perhaps the most obvious: if NACs are for-profit businesses, why would the NYSE need to create a special rule to accommodate their listing on the Exchange? According to its own account the NYSE has been helping businesses raise funds to create economic value for society and investors since at least 1792.¹³ Its Listed Company Manual lays out exacting requirements to ensure that companies listed on the Exchange follow its rules, the Nation’s securities laws, accounting rules

Exchange (NYSE), Archipelago (Arca), and the Pacific Exchange (PCX) merged to form the publicly traded NYSE Group, ending membership ownership of the Exchange. In 2008, the NYSE acquired the American Stock Exchange, becoming the third largest U.S. options market. By 2013, ICE acquired the NYSE and remains the parent organization of the Exchange today.” “The History of NYSE,” nyse.com, accessed Oct. 25, 2023, <https://www.nyse.com/history-of-nyse>.

⁹ “NYSE Listed Company Manual,” nyseguide.srorules.com, accessed Oct. 25, 2023, <https://nyseguide.srorules.com/listed-company-manual>.

¹⁰ Ibid. Section 303A.10.

¹¹ “InterContinental Exchange Global Code of Business Conduct,” sec.gov, 2021, 13, <https://www.sec.gov/files/rules/other/2021/ice-trade-vault/exhibit-d.4-ice-global-code-of-business-conduct.pdf>.

¹² Ibid FN 3.

¹³ Ibid FN 5.

and best ethical guides and practices. If NACs were like the other companies on the NYSE they would not need their own, special category.

The Proposal seeks to add this new listing standard because NACs are not like other companies. The Proposal sets out a pathway for listing entities that have no clear path to profitability using any recognized accounting method. They are given license to use unrecognized authorities (the Framework) to dupe the investing public into believing that buying natural assets and reserving them from economic development somehow creates value. And all of this would be done under the oversight of an entity, the NYSE, which itself would profit from the success of such a dubious proposition.

The only reason the NYSE would need a new rule to authorize the listing of NACs is because they do not qualify under the current, tested and legally sound rules. Adopting the proposal is inconsistent with the protection of investors, the promotion of capital formation, and the maintenance of fair and orderly markets.

Conclusion

The NYSE is proposing to allow the listing of NACs on its storied and august exchange. A NAC is an entity whose business model is to purchase natural assets like farmland and mineral rights, and withdraw them from economic development. To make this activity appear profitable the NYSE proposes to demand that a NAC use a new, untested and unrecognized accounting method which will arbitrarily assign value to things like “community wellbeing” and “soil health.”

The proposal would be comical were its consequences not so dire. The American people rely on farmland to feed our teeming cities, water to consume and run industrial processes, precious and critical minerals to manufacture technological innovations, and affordable energy to sustain our way of life. The Proposal would allow a handful of social-purpose entities to dupe investors into funding the acquisition of these vital assets and withdraw them from the public sphere. While this may enrich the promoters of the NACs and make others feel that they are contributing to “sustainable living,” in reality it will only harm the American way of life while inflicting harm on the investing public.

The SEC must reject the NYSE’s proposal.

Sincerely,

Justin Bis

Director

Financial Fairness Alliance