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October 25, 2023

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Public Comment Re: SR–NYSE–2023–09

BlueRibbon Coalition/ShareTrails (BRC) is writing to provide feedback for SR–NYSE–2023–09 Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies. BRC is a national non-profit organization that champions responsible recreation and encourages a strong conservation ethic and individual stewardship. We champion responsible use of public lands and waters for the benefit of all recreationists by educating and empowering our members to secure, protect, and expand shared outdoor recreation access and use by working collaboratively with natural resource managers and other recreationists.

With a strong history and background in environmental stewardship, we have concerns with this proposed rule change.

Major Questions Doctrine

The creation of Natural Asset Companies (NACs), is a rulemaking that SEC acknowledges will result in addressing an underinvestment gap that is “orders of magnitude larger” than the \$5 trillion/year financing gap for climate change. A rulemaking designed to create a market impact of this size certainly runs afoul of the Major Questions Doctrine. If Congress intended the SEC to adopt listing standards for NACs it would have codified this issue of substantial political and economic significance with an appropriate statute.

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The Major Questions Doctrine, as recognized by the U.S. Supreme Court in various cases, holds that when an administrative agency's proposed rulemaking involves matters of profound economic or political importance, and where there is ambiguity or uncertainty surrounding the agency's authority, Congress must expressly delegate the authority to make such significant policy changes.

Upon careful review of the proposed rulemaking SR–NYSE–2023–09, it is evident that this rulemaking addresses matters of profound economic and social significance, with far-reaching implications for market participants, investors, and the broader economy. The changes proposed under this rulemaking impact trillions of dollars of economic activity. These changes will create substantial environmental impact. These changes label Agriculture a “threat to life on earth.” These changes will potentially allow private investors from foreign nations to securitize and control national parks, which contribute billions of dollars of economic activity to gateway communities. Any changes to management of national parks would adversely affect BlueRibbon Coalition and its members.

The proposed rulemaking appears to lack a clear and unambiguous grant of authority from Congress to effectuate such sweeping changes. This absence of clear congressional authorization raises serious concerns about the potential violation of the Major Questions Doctrine. It also raises jurisdictional questions. The Department of Interior, the Environmental Protection Agency, and the Department of Justice will all be impacted by this proposed rule, which is why Congress is better equipped than the SEC to establish something such as a NAC.

In light of these concerns, I respectfully request that the SEC carefully evaluate the proposed rulemaking and determine whether it complies with the Major Questions Doctrine. Additionally, I urge the SEC to consider the potential legal consequences of proceeding with a rulemaking that may exceed its statutory authority.

Equal Treatment

Stock exchanges are required to treat listed companies fairly and equally. This proposed rule favors NACs over others such as mining companies, agricultural concerns, and others in a way that appears discriminatory or unfair.

Disclosure Requirements

This proposed rule change introduces new disclosure standards or practices. These standards are unclear and it is unclear that the disclosure standards will enable NACs to live up to the lofty purposes articulated in the Rule. Federal Agencies are required to adopt more rigorous environmental analyses to purchase paper clips than is required by this rule. Neither the SEC nor the NYSE have special

expertise in analyzing environmental impact, and the disclosure requirements contemplated by this rule raise a lot of questions about whether these standards will set up NACs to fail. The privatization and securitization of assets that in many cases are a public good raises concerns that these disclosure requirements will cloak public information behind the veil of trade secrets.

It is also arguable that these new standards unfairly disadvantage existing market participants. These standards could also create barriers of entry or anticompetitive effects, which would raise antitrust concerns.

Due Process

Because this rule is so significant, the SEC should have allowed the full length of time for public comment as contemplated by SEC regulations. It isn't clear why the public comment period was only open for 21 days. We request the SEC consider extending the deadline for collecting information on this proposal.

FATCA Concerns

The adoption of listing standards for Natural Asset Companies could create a situation that may be seen as conflicting with FATCA requirements.

Foreign Entity Classification: Natural Asset Companies might be structured in a way that could raise questions about their classification under FATCA. Under FATCA, certain foreign financial institutions (FFIs) are required to report information about U.S. account holders. If Natural Asset Companies operate as FFIs, they would have to comply with FATCA reporting requirements. The proposed rule does not sufficiently address the potential FATCA obligations of these companies, creating ambiguity for investors and regulators.

Securities Issuance and Tax Implications: The NYSE listing standards may impact how Natural Asset Companies issue securities, including foreign ownership or participation. If these standards allow for substantial foreign investment, there could be tax implications for both the company and foreign investors under FATCA. Companies and investors need clear guidance on how these investments are treated and reported.

Lack of Adequate Disclosure: FATCA requires certain disclosures regarding foreign financial accounts, and investors often rely on company disclosures to determine their tax obligations. If Natural Asset Companies listed on the NYSE do not adequately disclose their FATCA-related obligations and reporting, this may violate FATCA's transparency and disclosure requirements.

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Inadvertent Non-Compliance: Natural Asset Companies might inadvertently fall into non-compliance with FATCA due to a lack of understanding or clarity on how their NYSE listing affects their FATCA obligations. This could result in unintended legal and financial consequences for these companies, potentially harming both the companies and their investors.

FIRRMA Compliance

The NYSE Listed Company Manual's adoption of listing standards for Natural Asset Companies may potentially be in violation of FIRRMA (Foreign Investment Risk Review Modernization Act) and the authority of the Committee on Foreign Investment in the United States (CFIUS).

National Security Concerns: FIRRMA significantly broadened the scope of CFIUS reviews to include non-controlling investments by foreign entities in U.S. businesses that deal with infrastructure and natural resources. The listing standards for Natural Asset Companies contemplates foreign entities acquiring stakes in these companies, raising concerns about national security and the control of critical assets.

Undisclosed Ownership and Control: CFIUS's primary concern is to ensure that foreign ownership or control of U.S. businesses does not pose a threat to national security. If the NYSE does not adequately require disclosure of foreign ownership or control in Natural Asset Companies or if the standards fail to address CFIUS review requirements, it could inadvertently facilitate transactions that violate FIRRMA.

Non-Compliance with CFIUS Filings: FIRRMA mandates that certain transactions undergo mandatory CFIUS reviews, and parties involved in these transactions must submit filings for review. NAC listing standards should require companies to disclose their compliance with CFIUS review requirements.

Lack of National Security Safeguards: The NYSE should ensure that its listing standards for NACs that incorporate mechanisms to safeguard national security interests. NACs create a substantial risk that foreign entities might gain significant influence over companies with access to critical natural resources without adequate national security oversight.

Adversarial countries, such as China, can own shares in NACs that hold the rights to our federal lands and profit from its protection while controlling how we use these lands. Exhibit 5 of the SEC proposed rule is the manual language that will be adopted by the New York Stock Exchange authorizing the listing of NACs. At section 103.00 "Foreign Private Issuers," it states: "The Exchange welcomes listing

inquiries from foreign private issuers.” This gives foreign investors permission to hold shares in or create an NAC. Importantly, however, there is nothing in the rule, the NYSE manual language, or the IEG Framework that prohibits foreign nations from also holding shares in or creating an NAC. As such, the rule likely completely overlooks FIRRMA compliance.

BRC opposes securitizing of public land owned by sovereign nations into NACs. If public lands managed by the federal government of the United States were controlled by private interests, our members who utilize public lands will be adversely affected.

BRC would like to be considered an interested public for this project. Information can be sent to the following address and email address. We did request to be an interested public on this action in a previous comment.

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Sincerely,

A handwritten signature in black ink, consisting of the letters 'B' and 'B' followed by a long horizontal line.

Ben Burr
Executive Director
BlueRibbon Coalition

A handwritten signature in black ink, appearing to read 'Simone Griffin'.

Simone Griffin
Policy Director
BlueRibbon Coalition