

December 18, 2023

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F St., NE
Washington, D.C. 20549

Re: File Number 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

Dear Ms. Countryman:

The Club for Growth Foundation’s (“Foundation”) core mission is to inform the general public about the many benefits of economic freedom and limited government. We write out of concern that the proposed change to the rules of the New York Stock Exchange (“NYSE”) would depart from the statutory mission Congress has given exchanges and the Commission itself under the Securities Exchange Act of 1934 by distorting the securities marketplace to favor particular domestic policy goals—distortion that would be antithetical to the ideals of the free market.

Exchanges serve as critical agents in carrying out statutory securities policy. That is why the Commission may register an exchange only after concluding that it “has the capacity to be able to carry out the purposes of” the securities laws.¹ It is thus vital that exchange rules—and most of all the rules of the NYSE, America’s premier exchange—pursue the purposes of the securities laws. Indeed, Congress has mandated that the Commission may approve a proposed change to the rules of an exchange only “if it finds that such proposed rule change is consistent with the requirements of” the federal securities laws.² Congress left us in no doubt as to the purposes exchange rules ought to further: they must

be 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

¹ 15 U.S.C. 78f.

² 15 U.S.C. 78s(b)(C)(i).

mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.³

As should now be clear, exchanges do not exist to promote substantive policy goals like public health and a pristine environment; rather, their purpose under federal law is to facilitate transparent and efficient trading of securities among private parties. This is not to denigrate all the many substantive goals that other agencies and entities pursue; it is just to say that these goals are not the mission of exchanges. To ensure that exchanges remain laser-focused on their mission of promoting the transparent and efficient trading of securities, Congress provided that the Commission may not register an exchange if its rules aim “to regulate ... matters not related to the purposes of” the securities laws.⁴

The NYSE’s proposed rule change does not pursue the aims picked out by Congress. Rather, consistent with recent developments at the Commission and elsewhere,⁵ the new rule is designed to further some domestic policy goals over others. The NYSE explains that the proposed new rule is designed to “[e]nd the overconsumption of and underinvestment in nature.”⁶ This may be a laudable goal, but it is not one Congress had in mind when it enacted the securities laws. The NYSE therefore has no business pursuing this goal “not related to the purposes of” the securities laws, nor the Commission in approving a rule that pursues such a goal.⁷

The impropriety of the NYSE’s goal here becomes even more apparent when we consider the many federal, state, local, and private efforts dedicated to conserving natural resources. Conservation is a main purpose of the Department of the Interior and of the 84 million acres of the federal park system that the Department administers.⁸ It is also a main mission of the U.S. Department of Agriculture’s Forest Service.⁹ Conservation efforts are tremendously important,

³ 15 U.S.C. 78f(b)(5).

⁴ *Id.*

⁵ See, e.g., Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (2022).

⁶ 88 Fed. Reg. 68811, 68812 (2023).

⁷ 15 U.S.C. 78f(b)(5).

⁸ National Park Service, *About the National Park Service*, <https://home.nps.gov/aboutus/aboutus.htm#:~:text=The%20National%20Park%20Service%2C%20a%20bureau%20of%20the,Puerto%20Rico%2C%20the%20U.S.%20Virgin%20Islands%2C%20and%20Guam.>

⁹ Forest Service, *This Is Who We Are*, <https://www.fs.usda.gov/sites/default/files/This-is-Who-We-Are.pdf>.

and the Foundation supports them. But they are not the province of the securities laws, the NYSE, or the Commission, which lacks the competence to engage in this mission entrusted to others. This lack of competence in the subject matter to be regulated, the Supreme Court has explained, is a compelling sign that Congress did not intend such regulation in the first place.¹⁰

The NYSE's proposal illustrates the peril of using the securities laws to pursue substantive social policy. For by privileging environmental goals rather than facilitating private parties' trading, the proposed rule would affirmatively *undermine* the exchanges' own mission. That is because natural asset companies ("NACs") are not investments at all as traditionally understood. Investors expect to earn profits; that expectation distinguishes the financial activity Congress intended to cover under the securities laws.¹¹ But that is not the purpose of natural asset companies, which exist "to actively manage, maintain, restore ... and grow the value of natural assets and their production of ecosystem services" and which may engage in "sustainable revenue-generating operations" only when "consistent with the company's primary purpose."¹² Investors who come to the NYSE to earn a profit for themselves and their families will suffer a shock when they discover they have instead in essence made a donation to an environmental cause. This potential for confusion dramatically undermines the Commission's core mission of protecting investors. Rather than risk this, the Commission should restrict itself to its own mission and allow others, especially the Departments of Agriculture and the Interior, to handle conservation.

But this is not the only way the NYSE's new rule would run counter to the purpose of the securities laws. It would also impede the "free and open market" that exchange rules are bound to promote,¹³ as well as the efficiency, competition, and capital formation that the Commission must consider when evaluating a proposed change to a self-regulatory organization's rules.¹⁴ For natural asset companies would be required to commit to a set of onerous restrictions that would tie up both capital and land in inefficient, non-competitive use.

To remain listed on the NYSE, for instance, natural asset companies would be required to license ecological benefits of natural assets from their owners for a minimum of ten years and would be delisted if they alienate a license.¹⁵ Conditioning investment opportunities on such long-term commitments would tie up capital, drying up the efficient capital markets that the

¹⁰ See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2612-13 (2022).

¹¹ Cf. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

¹² 88 Fed. Reg. at 68814.

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 15 U.S.C. 78c(f).

¹⁵ 88 Fed. Reg. at 68815.

exchanges exist to promote and degrading the competition both for capital and for the development of natural assets. Further, NACs would be required to commit to onerous restrictions on the economically productive use of their land.¹⁶ Again, while many other programs sensibly set aside land from productive use for the sake of conservation and other important goals, the NYSE and the Commission exist to pursue not those goals but rather a transparent and efficient securities marketplace—a goal undermined by reserving land from economically productive use.

Remarkably, the Commission’s notice fails to discuss the goals of efficiency and capital formation that the Securities Exchange Act requires it to consider. It discusses competition only briefly, observing that the NYSE believes its rule would promote competition by listing a new type of investment in which investors could choose to place their funds.¹⁷ But it is no benefit to competition to provide investors with new ways *not* to compete, i.e., to *remove* their funds from the capital markets rather than use them to earn a profit and enhance productivity. And in any event, the proposal never explains the basis for believing that the gain the NYSE anticipates to competition outweighs the loss to competition discussed in the preceding paragraph, not to mention the impediment to efficiency and capital formation.

Perhaps most puzzling of all are the proposed rule’s requirements that aim at neither a profit nor the conservation benefits that are the proposal’s own prime purpose. For instance, NACs would be required to commit to sharing their common stock with local communities and to improve biodiversity where possible.¹⁸ These may be praiseworthy goals, but not every company chooses to prioritize them among all the other important objectives they may pursue. The new rule would needlessly restrict companies, and thus impede efficiency, by imposing these requirements unrelated to the purposes of NACs themselves. Indeed, the pursuit of these extraneous goals debar[s] the Commission from approving the Commission’s proposal, for it means that the proposal “regulate[s] ... matters not related to the purposes of” the securities laws.¹⁹

I cannot close without noting one unseemly feature of this proceeding: the NYSE owns an interest in Intrinsic Exchange Group Inc., the organization pioneering NACs and which intends to “promote the listing of NACs on the NYSE.”²⁰ Though the NYSE commits to evaluate “the suitability for listing of any applicant NACs” on the merits,²¹ it is difficult to

¹⁶ *Id.* at 68818.

¹⁷ *Id.* at 68817.

¹⁸ *Id.* at 68814.

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ 88 Fed. Reg. at 68813.

²¹ *Id.*

believe that NYSE staff charged with evaluating a natural asset company’s application for listing would be impervious to the interests of the NYSE’s partly-owned subsidiary the Intrinsic Exchange Group. At the very least, this close association between the Intrinsic Exchange Group and the NYSE creates an appearance of impropriety.

* * *

For the foregoing reasons, the Club for Growth Foundation urges the Commission to disapprove the NYSE’s proposed rule. If it chooses not to do so, it should reopen the comment period on the rule. The Securities Exchange Act requires the Commission to “give interested persons an opportunity to submit written data, views, and arguments concerning” proposed rule changes by self-regulatory organizations.²² Here, though, the Commission gave members of the public a dramatically foreshortened time to comment—only twenty-one days, seven of which were weekends or holidays. And while the Commission later gave itself more time to respond to the NYSE’s submission, it never reopened the comment period for the public. To give the public a meaningful opportunity to express views on this important development, the Commission must now reopen the comment period.

Further, it should now be clear that the NYSE’s rule proposal raises issues far too important for approval under the Commission’s summary decision procedure. If the Commission elects not to disapprove the proposal, it should “institute proceedings ... to determine whether the proposed rule change should be disapproved.”²³ Doing so would give the Commission the benefit both of a hearing and of time for adequate consideration of the questions raised by commenters (and members of the public who would comment if given adequate time to do so).²⁴

Sincerely,
David McIntosh
President
Club for Growth Foundation

²² 15 U.S.C. 78s(b)(1).

²³ *Id.* 78s(b)(2)(A)(i)(II).

²⁴ *Id.* 78s(b)(2)(B).