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December 27, 2023

Secretary Sherry Haywood
Assistant Secretary
Securities and Exchange Commission
Division of Trading and Markets

rule-comments@sec.gov

Re: Comments – Securities and Exchange Commission – Release No. 34-98665; File. No. SR-NYSE-2023-09

Dear Sirs:

On behalf of the New Mexico Federal Lands Council in New Mexico, the Rio Blanco and White Rivers Conservation Districts in Rio Blanco County, Colorado, and the Budd-Falen Law Offices LLC in Wyoming, please accept these comments regarding the above-described rulemaking. As explained below, there is simply no legal authority for private companies to hold assets in public or federal lands that statutorily are either (1) being held in trust for citizens of the United States or (2) are open to multiple use for livestock grazing, mining, timber production, oil and gas development or other uses. Additionally, allowing and encouraging foreign entities to acquire private lands, eliminating economic use of those lands and trading such holding on the New York Stock Exchange is detrimental to the national security and economic interests of this Country. As such, this proposed regulation must be withdrawn.

I. "No Use" does not Equate to "Conversation Use" or a "More Sustainable Ecosystem."

As illustrated by these Proposed Rules, the Securities and Exchange Commission (SEC) and the Intrinsic Exchange Group, Inc. (ISG) seem to equate "no use" of private

lands and national assets on federal and public lands to the conservation and sustainability of the natural resources. This is a completely false premise. Rather, often human management is what sensitive environments need to keep them healthy. Not allowing human management to be part of "conservation" will be both detrimental to the environment, and to the natural resource industries that keep our lands healthy and are essential to local economies in the West.

With regard to public lands, the proposed SEC rules are premised upon the adoption by the Bureau of Land Management (BLM) of the "conservation use rule" issued in draft in the *Federal Register* on April 3, 2023. 88 Fed. Reg. 19583 (April 3, 2023). That rule has not been issued in final, and if it is, will be subject to numerous legal challenges because that proposed rule violates the Federal Lands Policy and Management Act, the Taylor Grazing Act, the Regulatory Flexibility Act and the Major Questions Doctrine.

For example, like the BLM's conservation use rule, the SEC proposed rule states that National Asset Companies (NAC) who acquire public or private lands as "assets" would be prohibited from:

> [E]ngaging directly or indirectly in unsustainable activities. These are defined as activities that cause any material adverse impact on the condition or natural assets under its control, and that extract resources without replenishing them (including, but not limited to, traditional fossil fuel development, mining, unsustainable logging, or perpetuating industrial agriculture).

Then the SEC proposed rule notes that there are causes to the destruction of public and federal lands such as wildfire and climate change. However, the elimination of well managed livestock grazing and timber production by NACs will increase these

destructive harms, not eliminate them. For example, both livestock grazing and the harvesting of timber reduce the risk of wildfires by reducing the fuel load needed for those fires. "Moderate grazing decreases wildfire probability by decreasing fuel amount, continuity, and height and increasing fuel moisture content. Grazing, through its modification of fuels, can improve fire suppression efforts by decreasing flame lengths, rate of fire spread, and fire severity." Kirk W. Davies, Katie Wollstein, Bill Dragt, and Casey O'Connor "Grazing Management to Reduce Wildfire Risk in Invasive Annual Grass Prone Sagebrush Communities," Rangelands 44(3), 194-199, (24 June 2022). https://doi.org/10.1016/j.rala.2022.02.001. In fact, one of the best ways to lower the impacts of climate change is to reduce harm caused by wildfires. In September of 2020, wildfires in California alone generated more than 91 million metric tons of carbon dioxide, which is roughly 30 million metric tons more carbon dioxide emissions than the state emits annually from power production. *See* The Climate Connections of a Record Fire Year in the U.S. West February 22, 2021. https://climate.nasa.gov/explore/ask-nasa-climate/3066/the-climate-connections-of-a-record-fire-year-in-the-us-west/. Thus, acquisition of public or federal lands by a NAC will increase the likelihood that these lands will succumb to increased wildfires and will emit more harmful carbon dioxide, a greenhouse gas, into our atmosphere, exacerbating the effects of climate change. Given that, the entire premise of the proposed rule is wrong.

Also concerning is the SEC's statement that NACs manage its acquisitions for "ecological and socially equitable goals." Most rural communities and rural counties in the West are dependent on the use and management of federal or public lands. Ninety-

seven percent of the United States is referred to as "rural America." An estimated 60 million or 17.5% of the U.S. population lives in these rural areas. Almost one-half of the land in the 11 continuous Western states is managed by the federal government. Is the displacement of this population base truly an ecological or socially equitable goal? It is certainly not for the rural communities, rural counties and the citizens who live in these areas.

The SEC's attempt at requiring NACs to provide funding to "support community well-being" such as education and health is also completely devoid of an understanding of the nature of rural economies in the West. According to a study by the University of Wyoming, it would take between 15 to 33 years for travel and tourism dollars to make up for the elimination of livestock grazing on BLM lands in Fremont County, Wyoming. Over $100 billion in livestock sales are directly attributable to livestock grazing in Wyoming. Voluntarily funding education and health will not make up for this loss.

This same argument is true if NACs (including those owned by foreign governments) acquire private farmlands. According to the proposed SEC rule, use of private lands owned by NACs is limited to eco-tourism or production of regenerative food crops in a working landscape. The problem is that according to the Brookings Institute, rural small businesses are the key to economic recovery, particularly after the COVID-19 outbreak. According to a report released in 2023, in total, business-to-business ag supply chain purchases, such as feed and fencing, contributed an additional $476 million to Wyoming's economy. Household spending of agricultural industry labor income in local restaurants, retail stores and other establishments added another $338

million. In 2021, for every dollar generated by agricultural production, local purchases supporting agricultural businesses generated an additional $0.28 cents. Local spending by agricultural industry and ag supply-chain workers generated an additional $0.20 for each dollar spent in a local café, grocery store or other retail store. *See* https://bit.ly/WYEconImpactAg2021. last visited December 27, 2023. NACs voluntary spending on "education and health" will not make up for these lost dollars in rural America.

II. Allowing the Acquisition of Federal or Public Lands Has No Basis in Statute.

The legal basis for any federal agency allowing a NAC to acquire lands or interests in lands has no basis in statute. As stated above, the SEC's proposed rule is based upon the premise that NACs can acquire interests in federal or public lands. For example, even before the BLM (which was not established until 1946), the Taylor Grazing Act (TGA) governed the management of lands in the West. TGA was passed in 1934 to "provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a. According to Congress, the TGA was intended to stabilize the livestock industry by **preserving** [emphasis added] ranchers' access to the federal lands in a manner that would guard the land against destruction. *See* Taylor Grazing Act, ch. 865, 48 stat. 1269 (June 28, 1934). The TGA directs the Secretary of the Interior to give renewal preference to those already holding permits and to "adequately safeguard" the grazing privileges, "so far as consistent with the purposes and provisions" of the TGA. *Id.* § 315b. There is nothing in the TGA that allows lands within a grazing district to be acquired by a NAC.

Additionally, the BLM has attempted to eliminate livestock grazing before and such an effort was rejected by the courts. In 1995, the BLM issued final grazing regulations, which among other things, added a "conservation use" rule which allowed the BLM to issue ten-year permits to public lands that would exclude livestock grazing. *Public Lands Council v. Babbitt,* 167 F.3d 1287, 1307, (10th Cir. 1999). According to that regulation, the BLM defined "conservation use" as an activity, excluding livestock on an allotment for a period of ten years. *Id. The* Tenth Circuit rejected that regulation holding that the BLM could not issue a permit on a grazing allotment that excludes grazing. *Id.* The Court reasoned:

> Our decision rests on the plain language of the relevant statutes. The TGA provided the Secretary with authority to issue "permits to graze livestock on . . . grazing districts." 43 U.S.C> § 315b. That statute does not authorize permits for any other type of use of the lands within grazing districts. [The Public Rangelands Improvement Act] PRIA confirms that grazing permits are intended for grazing purposes only. Both those statutes define a grazing permits and lease" as "any document authorizing use of public lands . . . . *for the purpose of grazing domestic livestock."* Thus the TGA, FLPMA, and PRIA each unambiguously reflect Congress's intent that the Secretary's authority to issue "grazing permits" be limited to permits issued for the purpose of grazing domestic livestock." None of these statutes authorizes permits intended exclusively for "conservation use." The Secretary's assertion that "grazing permits" for use of land in "grazing districts" need not involve3 an intent to graze is simply untenable.
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> *Id*. at 1307. Citation omitted, emphasis in original.

Certainly, if the Department of the Interior cannot eliminate livestock grazing, allowing NACs to acquire those same lands to be held for a 10-year period cannot run counter to the binding precedent of the Tenth Circuit Court.

The Federal Lands Policy and Management Act also does not allow NACs to acquire interests in federal or public lands. FLPMA was passed by Congress in 1976 and

the first regulations implementing FLPMA were adopted shortly thereafter. FLPMA requires that BLM managed lands be open and managed for "multiple use." As described by the BLM, "[T]he term "multiple use" seems fairly self-descriptive. For public land management, it means: public lands have many resources (renewable and non-renewable), such as forage, timber, energy, habitat, etc., and public lands have many uses, such as grazing, recreation, mining, etc. The multiple use 'mandate' through FLPMA states that the resources and uses on public land must be utilized in a balanced combination that will best meet the needs of the people (current and future needs for current and future generations)." Multiple Uses, Multiple Users – March 9, 2016 (blm.gov) (last visited December 26, 2023). Allowing a NAC to acquire lands or interests in lands where no use cannot occur violates that statutory mandate.

In addition, FLPMA only designated relatively small categories of "special management areas" where multiple use would not be allowed. One of those special management areas was termed Areas of Critical Environmental Concern (ACEC). ACECs are lands in need of special management to protect important natural, cultural and scenic resources or to protect human life and safety. Since the passage of FLPMA, 1,021 ACECs have been designated, covering more than 19 million acres. To be managed as an ACEC, the BLM must nominate the land through its land and resource management planning process outlined in FLPMA and allow public comment on such nomination. Additionally, any proposed designation of an ACEC, or other special management area, must be analyzed through the National Environmental Policy Act (NEPA) and an Environmental Impact Statement (EIS) or Environmental Assessment

(EA) must be completed. NEPA review is required for any action "significantly impacting" the human environment. Making less public or federal land available for multiple use and eliminating such multiple use impacts the human environment. Arbitrarily changing the use on these lands without NEPA review is a blatant violation of NEPA and defeats the entire purpose of the law.

Neither has the SEC allowed review of this proposal under the Regulatory Flexibility Act (RFA). The RFA generally requires that Federal agencies prepare a regulatory flexibility analysis for rules subject to the "notice and comment" rulemaking requirements found in the Administrative Procedures Act (APA). This proposed rule will have a significant impact on small rural businesses across the West that depend on their citizens' use of public and federal lands. According to the RFA, "Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities." *See* RFA §603(a). Thus, the RFA clearly states that a regulatory flexibility analysis to *determine if* the rule will have a significant impact on small businesses or entities.

This rule will clearly impact small businesses. In this case, more than 97% of beef cattle farms and ranches are classified as family farms. In Wyoming, the BLM manages 18.4 million acres or 1/3rd of the entire state. There is an economic impact of 215.3

million dollars per year from public land livestock grazing in Wyoming alone. If there is a shift from the requirements of the TGA that allows NACs to acquire lands or interests in lands and eliminates the uses thereon, there will undoubtedly be an economic impact on small businesses and entities and a regulatory flexibility analysis should be completed.

In fact, given the huge economic impact of eliminating multiple use on federal or public lands, analysis must be completed by the Small Business Administration (SBA). The SBA's purpose was to represent the views of small entities before Federal agencies and Congress. (SBREFA),[1] giving small entities a voice in the rulemaking process. For all rules expected to have a significant economic impact on many small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives. Also, the Small Business Jobs Act of 2010 requires agencies to consider comments provided by SBA. The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the F*ederal Register*, unless the agency certifies that the public interest is not served by doing so. The SBA's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and

[1] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

efficiently as possible without imposing unnecessary burdens on the public."

III. The Proposed Rule Violates the Major Questions Doctrine.

Congress can delegate its authority to the executive agencies to make regulations in compliance with Congress's direction. However, the U.S. Supreme Court has declared that if an agency seeks to decide an issue of "major national significance," its action must be supported by clear congressional authorization. Under the major questions doctrine, the Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue. *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014). The SEC's proposed rule conflicts with the major questions doctrine.

First, with regards to use on federal or public lands, not only will selling or leasing those lands to eliminate multiple use have a significant and political impact on the West, but Congress has not clearly given the SEC or any other federal agency the authority to sell or lease lands to eliminate productive use of the land. Had Congress intended "no use" to be a multiple use of federal lands, then it would have so stated in its authorizing legislation.

Second, even if the SEC can argue that allowing NACs to acquire lands or interests in federal or public lands is not a significant economic impact, the SEC certainly cannot argue that it is not a significant political question. There are countless political debates that impact nearly all of the western states regarding the uses on the federal estate, particularly with new initiatives like the Biden Administration Executive

Order on 30 x 30 which attempts to stop all use on 30% of our nation's land and waters by the year 2030. Because of these political and economic impacts, Congress can only be the body that authorizes NACs to acquire lands or interests in lands, not the SEC or some other federal agency outside of their statutory mission and authority.

It is also questionable whether the SEC can require private companies to comply with the environmental policy, social policy, human rights policy, and biodiversity policy consistent with the United Nation's Charter as required by the SEC's proposed rule. *In Reid v. Covert*, 354 U.S. 1 (1957), the U.S. Supreme Court determined that the U.N. Charter was a treaty, and that treaty law did not supersede the U.S. Constitution.

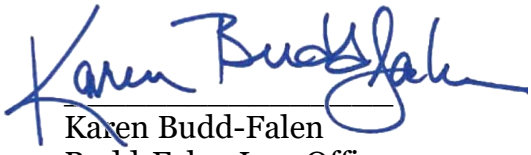
IV. Allowing Foreign Ownership of American Private Lands, Federal and Public Lands Is Not in America's Best Interest.

The SEC proposed rule specifically allows foreign ownership in NACs. According to research by the National Ag Law Center, in 2023 alone, 12 states passed laws restricting foreign ownership or investment in private lands located within their states. State Proposals on Restricting Foreign Ownership of Farmland: Part Eight - National Agricultural Law Center (nationalaglawcenter.org) (Last visited Dec. 26, 2023). This is added to the 12 states that already had state laws limiting foreign ownership of private land within those states. In fact, this controversy traces back to the origins of the United States when the founding fathers signed treaties and took other actions to eliminate foreign ownership of lands now within the United States. Ownership of Agricultural Lands - National Agricultural Law Center (nationalaglawcenter.org) (last visited Dec. 26, 2023). Some commentators and Members of the 118th Congress have called for

increased federal scrutiny of foreign ownership of U.S. land due to concerns over issues including national security, economic competitiveness, and the absence of U.S. citizens' reciprocal right to purchase land in some foreign countries. The Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA) has long required foreign investors to disclose their interests in U.S. agricultural land. 77 U.S.C. §§ 3501 – 3508. The SEC proposed rule, however, ignores all of these concerns and simply allows foreign interests, including those hostile to U.S. interests, to hold shares in or create NACs. This is repugnant to American interests.

In sum, the SEC proposed regulation must be withdrawn. The SEC regulation violates American law and is against American interests.

Respectfully submitted,



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