

January 17, 2024

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

Via SEC Comment Portal:

<https://www.sec.gov/comments/sr-nyse-2023-09/notice-filing-proposed-rule-change-amend-nyse-listed-company-manual-adopt#no-back>

Re: *Comments regarding Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies (SEC No. SR-NYSE-2023-09)*¹

Dear Ms. Countryman:

Below are comments from Advancing American Freedom (“AAF”) on the Filing of a Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies, SEC No. SR-NYSE-2023-09, filed with the SEC September 29, 2023.

Introduction

The New York Stock Exchange’s (“NYSE”) proposed rule regarding the creation and listing of what it calls “Natural Asset Companies” (“NAC”) creates far more questions than it answers, not least the rule appears to be inconsistent with the mission of the SEC. Its adoption would be harmful to the interests of investors would undermine confidence in the market, and would instigate a dramatic shift away from the wealth-generating purpose of publicly traded corporations. The proposed rule’s reasoning is based on exaggerated and unsubstantiated claims that serve as a self-made emergency for destroying the social capital of Generally Accepted Accounting Principles (“GAAP”); bizarrely, the core purpose of a NAC is not reported using GAAP but some United Nations-endorsed claptrap. This comment poses a series of questions intended to help the NYSE and the SEC to avoid further embarrassment and almost certain litigation over this rule.

The longstanding mission of the SEC is “[t]o protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”² The purpose expressed by Congress for the SEC in the Securities Exchange Act of 1934 was to “provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets and for other purposes.” *Blue Chip Stamps v. Manor Drug*

¹ Citations in this comment to the proposed rule refer to the page numbers of the full proposed rule with appendices available at https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2023/SR-NYSE-2023-09_Re-file_2.pdf.

² Strategic Plan of the SEC <https://www.sec.gov/strategic-plan/about>.

Stores, 421 U.S. 723, 728 (1975). In other words, for Congress, the purpose of the SEC was to ensure honest dealings in the US securities market. The SEC must not approve the NYSE's proposed rule without first ensuring that it is amended extensively so that its approval would be consistent with the SEC's statutory authority and to address faithfully and substantively the concerns raised below and in other comments like the one submitted on December 15, 2023, by thirty-two Members of Congress.³

What Function Would a NAC Serve that Cannot Be Served by Existing Corporate Structures?

Existing corporate structures were built upon hundreds of years of precedent in the market and in law. Why are NACs necessary? What function do they serve that cannot be served by existing corporate structures or trusts?

The ancestor of the modern corporation, the joint stock company, for example, arose as a means of sharing the risk of sea voyages during the Age of Exploration; the East India Company, the classic example of such a company, was founded in 1600. Trusts have an even longer pedigree: they have been used for over 800 years to safeguard⁴ pastures, forests, and even viewscapes. Donors have used trusts to restrict the use of land for a specific purpose:⁵ "Title to the land was conveyed to a lay person to be held by him as trustee for the religious corporation, which, after the donor's death, would have the use of the land and the right to all profits derived from it . . . Such 'uses' had been widely utilized since the 12th Century."⁶

Normal, regulated NYSE-listed corporations can perform many functions including, it seems, all the legitimate conservation functions a NAC would serve. Corporations may buy land and work to preserve its ecological integrity or seek to return it to some pre-human "natural" state.⁷ They can choose not to extract minerals from their own land and not to drill for oil. Perhaps they could also purchase conservation easements to do these things without buying the land itself. If NACs are like existing corporations in almost every way, then the only reasons for their creation must be found in their distinction from corporations as we understand them.

³ Harriet M. Hageman et al., Letter from Thirty-Two Members of Congress to U.S. Securities and Exchange Commission, Dec. 15, 2023 <https://hageman.house.gov/sites/evo-subsites/hageman.house.gov/files/evo-media-document/final-nac-letter-to-sec.pdf>.

⁴ "A trust imposes on trustees an indefinite burden of responsibility. They must discharge the terms of the trust in the interests of the beneficiaries, and they are accountable for any mismanagement... No more effective device has ever been discovered for ensuring the proper maintenance and durability of a bequest..." Roger Scruton, *How to Think Seriously About the Planet: The Case for Environmental Conservatism* 217-218 (Oxford: Oxford University Press, 2012)

⁵ "Then, again, we see that some of the lands and revenues of a religious house have often been devoted to some special object; they have been given to the convent 'to the use' of the library or 'to the use' of the infirmiry... Lastly, in the early years of the thirteenth century the Franciscan friars came hither. The law their being forbid them to own anything; but they needed at least some poor dormitory, and the faithful were soon offering them houses in abundance... the benefactor who was minded to give them a house, would convey that house to the borough community 'to the use of' or 'as an inhabitation for' the friars." Frederick Pollock and Frederic William Maitland, *The History of the English Law Before the Time of Edward I* 241 (Indianapolis: Liberty Fund, 2010)(1898).

⁶ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 235 (Cambridge: Harvard University Press, 1983).

⁷ What constitutes a natural state is somewhat imaginary, given the non-existence of land-use records prior to 1492. Humans have been here for thousands of years and have altered the landscape to suit their purposes. What was the natural state of the site of Tenochtitlan?

Provisions in the proposed rule for the creation of NACs require them to prioritize some ecological interests over generating a return for investors are a feature, but a normal corporation could engage in that as well. Oddly, NACs are barred from drilling for natural gas, if even to substitute for coal; barred from mining for lithium, if even to substitute electrical vehicles for internal combustion ones; and barred from mining for uranium, the ultimate carbon-free fuel for electrical generations. The biggest difference between NACs and other corporations is that dodgy accounting standards are baked into NACs, the use of which would be considered fraudulent for a normal corporation.

NACs, unlike other corporations, would be able to use less rigorous accounting measures, namely the United Nations-imagined System of Environmental-Economic Accounting -- Ecosystem Accounting Framework.⁸ NACs superficially look like corporations. Unlike a normal corporation, a NAC's primary purpose is to lock up natural resources from human use and not to generate returns for investors. Like makers of cryptocurrency have been under siege from the SEC, NACs would be able to "monetize" heretofore non-monetizable holdings that lack clear economic value through sleight-of-hand accounting gimmickry. Finally, NACs, unlike other non-charitable corporations, can prioritize non-quantifiable feel-good emotional responses over economic return for investors. All these weaknesses of the NAC form again beg the question, why are NACs necessary when every lawful function a NAC could perform is available in existing corporate structures? Why are NACs ethically acceptable when their only distinguishing features are a lack of accounting rigor, a dependence on contrived valuations of faux assets, and a disregard for the interests of the investing public?

How Can Investors in a NAC be Protected Against the Danger that Interested Parties Will Grossly Exaggerate the Value of Holdings that the NYSE Proposed Rule Claims Are Mispriced in the Market?

How can NACs and their promoters at the Intrinsic Exchange Group ("IEG") assign economic value where, as the NYSE tacitly admits, no such value can be priced?⁹ How will the value of "natural assets" and "ecosystem services" held by a NAC be assessed? What is the value of an untradeable "natural asset" or "ecosystem service?" NACs' valuation depends on assessing the "value" of such "assets." In practice, NACs would rely on a reporting framework created by the Intrinsic Exchange Group ("IEG") in which the NYSE owns a minority interest, and which was created to support the existence of NACs.¹⁰

The IEG reporting framework recognizes three types of value; no more and no fewer. Most concerning is its intent to assign a dollar value to what it calls "[n]on-use values [which] are values *assigned* to ecosystems, irrespective of whether people use or intend to use the ecosystems." (Emphasis added). The use of the word "assigned" indicates the artificial nature of this value assessment. For example, the beauty of a viewshed of rolling hills has no intrinsic economic value. One person may be willing to spend only money he could make back by using the land. Another may be willing to spend money to buy the land and thus protect the view from his property. The beauty of a sunrise, the dew on a spider's web, a child's first kick in his mother's womb, or a bride's "I do," the things that make life worth living, cannot be priced. But we are asked to believe that the experts at IEG can appraise the priceless.

⁸ Proposed Rule at 10.

⁹ Proposed Rule at 24, 32-33 ("Most environmental values remain uncaptured by financial reporting.") ("[M]ost ecosystem services are not monetized today.")

¹⁰ Proposed Rule at 10. An organization with such an Orwellian name as the "Intrinsic Exchange Group" needs a main office with an equally auspicious title. Perhaps the Office for the Valuation of Intrinsic Capital Estimation ("VICE")?

The IEG's "non-use values" are broken down further into "bequest value" and "existence value."¹¹ The IEG defines the former as "the value of ensuring the ecosystems are available to future generations,"¹² and the latter as "the value of protecting the continued existence of an ecosystem, including the value of having a functioning ecosystem *for the sake of its own integrity*."¹³ (Emphasis added). Not all value, of course, is economic. Moral and spiritual value may be just as real as, and may carry even greater ultimate significance than, economic value. But the assignation of economic value to something as metaphysical as "the value of having a functioning ecosystem for the sake of its own integrity," apart from the willingness of people to spend their own money to preserve said ecosystem, is necessarily arbitrary and capricious.

This assignment of economic value to things that cannot be valued economically is well illustrated by the proposed rule's requirement that NACs adopt a "Biodiversity Policy that articulates a commitment to achieving no net loss, and where possible a net positive impact on biodiversity."¹⁴ What happens when the economic value of less biodiversity is greater than the economic value of more biodiversity? This is not a merely hypothetical question. "[T]he introduction of the invasive Nile perch," a type of fish, to Lake Victoria in Africa "contributed significantly to the decimation of local biodiversity while dramatically boosting the economic value of the lake."¹⁵ Here again the absurdity of NACs is laid bare. What if a NAC owned the rights to such a lake in the United States? According to its mandatory biodiversity policy, it would be unable to engage in activity that lessened the lake's biodiversity. The requirement for such a policy depends either on an elevation of spiritual value over economic value or on the preposterous assumption that the ecological status quo is always more economically valuable than some altered version of the environment. The absurdity of the latter is obvious. As one example, there is much more economic value in Manhattan today than there was 500 years ago when it was comparatively undeveloped. The error of the former is that, while such prioritization of noneconomic value is valid in many other contexts, in the context of a publicly traded corporation, doing so contravenes the fundamental purpose of publicly traded corporations: generating returns for investors. How is such a scheme anything more than an invitation to fraud?

The economic value of a good or service is determined by the price it can fetch in the free market. Junking up the NYSE with entities that operate without this fundamental understanding could rob individuals of their savings for education or retirement. Adam Smith¹⁶, whose writings were familiar to America's Founders and perhaps the legal team at the NYSE, recognized this insight, noting:

The things which have the greatest value in use have frequently little or no value in exchange; and on the contrary, those which have the greatest value in exchange have frequently little or no value in use. Nothing is more useful than water: but it will purchase scarce any thing; scarce any thing can be had in exchange for it. A diamond, on the

¹¹ Proposed Rule at 61.

¹² One supporter of Advancing American Freedom is a seventh-generation farmer in Rush County, Indiana. A family's connection to its ancestral land cannot be replicated or replaced by a bureaucrat's artificial valuation. This rule threatens to displace such farmers and families as the stewards and protectors of land.

¹³ Proposed Rule at 62.

¹⁴ Proposed Rule at 12.

¹⁵ Douglas J. McCauley, *Selling Out on Nature*, 443 *Nature* 27-28 (2006) https://labs.eemb.ucsb.edu/mccauley/doug/publications/McCauley_2006b.pdf.

¹⁶ See generally Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: 1776).

contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange for it.¹⁷

Nor was this insight original to Smith. Rather, it was put to paper after the investigations of the 16th Century Scholastics of the School of Salamanca.¹⁸ These Scholastics recognized that value depends largely on a combination of utility and scarcity as determined by those willing to pay. As Saint Bernardino of Siena wrote in 1591, “Water is usually cheap where it is abundant. But it can happen that on a mountain or in another place, water is scarce, not abundant. It may well happen that water is more highly esteemed than gold because gold is more abundant in this place than water.”¹⁹

It seems to us that NACs are being pushed by a small group of activists who have a high estimation for the value of an intangible setting in nature. Francisco García addressed this in 1583; “that although the quality of the good influences the price, we should not confuse value with quality.

This is manifest because we see variations in the prices of things which do not vary in quality: consider the example of a book. For one it is of great value and price; for another it is of low value and for others its value is nil. And the same thing happens with all products.²⁰

Such value is different in kind from what might be called intrinsic or spiritual value. Spiritual value cannot be reflected in a number. What is the dollar value of a human life or a sunset? It cannot be economically valued apart from someone’s willingness to pay. Yet that is exactly the kind of thing on which the IEG and NACs would attempt to place a price tag, knowing the price of everything but the value of nothing. Even the 16th Century monks of Salamanca knew that value depends on a willing buyer of a good or service and would shake their heads at the medieval thinking behind this rule.

Given that the value NACs are intended to hold is intrinsic, not economic, what structures exist to ensure that the economic valuation of “natural assets” and “ecosystem services” is not influenced by the shared interest of all involved parties that those valuations be inflated? The valuation of NACs and their holdings are to be disclosed in an Ecological Performance Report (“EPR”) that assesses that value according to the Ecological Performance Reporting Framework created by the IEG.²¹ NACs are the IEG’s *raison d’être*. NACs themselves, of course, have a vested interest in their own apparent success both to justify their existence and attract more investors. Thus, both the IEG and NACs have an incentive to assess the value of these “assets” and “ecosystem services” liberally. What is to stop the creation of a modern “tulip mania”²² where stock values for NACs are inflated because the value of the assets held by NACs is inflated,

¹⁷ Adam Smith, *The Wealth of Nations*, Book I Chapter IV. Thus, in the 16th Century, Scholastics of the School of Salamanca discovered the source of economic value. And 250 years ago, Adam Smith famously considered why diamonds are more valuable than water, putting to rest the debates among the unreflective. Though there appear to remain in the 21st Century, intellectual backwaters as of yet unreached by the insights of early modern Spain and Enlightenment Scotland.

¹⁸ Alejandro A. Chafuen, *Christians for Freedom: Late Scholastic Economics*, 96-97 (San Francisco: Ignatius Press, 1986).

¹⁹ *Id.*

²⁰ Chafuen, *supra* note 18, at 102, quoting Francisco García (1525-1585), *Tratado Utilísimo y Muy General de Todos Los Contratos, Quantos en los Negocios Humanos se Pueden Ofrecer* 183 (Valencia: 1583).

²¹ Proposed rule at 6.

²² In the 17th Century Netherlands over the course of three years, the trade value of tulip bulbs rose dramatically before ultimately crashing when people realized that what they were buying did not have lasting economic value, which is to say that people were buying them because other people said they were valuable and for no other reason.

creating a positive feedback loop that leads ultimately to collapse and significant losses for investors and the market generally?²³ Nor need there be a conscious effort to exaggerate the numbers. Driven along by their sense that they are on a socially responsible mission to save the planet and their personal admiration for the spiritual value of nature, those responsible for the valuation may find it difficult to distinguish between their own reverence for the nativeness of a pond's fish and the economic value of that pond which it is their responsibility to assess. What systems of accountability would be in place under the NYSE rule that would ensure that a disinterested third party will be able to assess the IEG's reporting framework and NACs' implementation of that framework for such inflated valuation? What objective metric could such a third party use to accomplish that assessment?

How is the abandonment of Generally Accepted Accounting Principles ("GAAP"), the most robust accounting practices in the world, and even the significantly less rigorous International Financial Reporting Standards ("IFRS") in favor of the UN-adopted System of Environmental Ecosystem Accounts Ecosystem Accounting ("SEEA EA") to bamboozle investors in low cashflow companies (verified by GAAP) but with airy-fairy services to the ecosystem in the billions of dollars (off-the-cuff SEEA EA fatuity) consistent with the SEC's mission to combat fraud in the securities markets? NYSE states that, "[A] NAC's activities are not well captured solely by traditional financial reporting standards like GAAP/IFRS, as most ecosystem services are not monetized today."²⁴ Instead, "[t]he Reporting Framework to be used by NACs is based on the standards developed in [the UN's] SEEA EA."²⁵ The NYSE rule says that the SEEA EA accounting standards have been adopted "with some minor adaptations to ensure that the natural asset valuations of NACs provide comprehensive, understandable, consistent, robust, and transparent information to investors and other users of the companies [sic] EPR."²⁶ However, saying it does not make it so. A 21st Century badge of fraud is the abandonment of GAAP standards to evaluate assets. Why abandon GAAP, the more rigorous and reliable accounting standard, unless doing so is designed to allow for bogus estimates that ape the rigor of accounting? That GAAP does not capture the value of things not able to be easily valued is no answer. The adoption of a more "flexible" accounting standard to assess the value of more speculative "assets" is a recipe for disaster. Has Paul Munter, SEC Chief Accountant, signed a memo assessing and authorizing the various accounting principles behind this rule? Has Jessica Wachter, Director of the Division of Economic Risk Analysis, approved the proposed rule based on analysis conducted by her office? If the answer is no, then why not? Why should their analyses not be made available to the public and the comment period extended so that the public can engage with them?

How can the valuation of "activities [that] are not well captured solely by traditional financial reporting standards," of "natural assets" and "ecosystem services" that have no clear economic value be

²³ Such bubbles can happen on their own because, as Meina Cai et al. note, "prices are an imperfect measure of value; they always are." Meina Cai et al., *Toward a Political Economy of the Commons: Simple Rules for Sustainability*, at 128 (2022). However, while both "markets and governments are [] imperfect" but "proponents of standards or regulation often assume away the imperfections of government." *Id.* Prices determined by the market may be imperfect but there is no reason to think that those assigned by the IEG and NACs would be anywhere near as accurate as those determined by the market.

²⁴ Proposed rule at 10.

²⁵ Proposed rule at 32. This attempt to place a dollar value on that which has no economic value will be "conceived and ordered (moved, seconded, carried, and minuted) in clean, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voices." C.S. Lewis, *The Screwtape Letters* at viii (MacMillan Publishing Co. 1961).

²⁶ Proposed rule at 32.

anything like as reliable as investors should be able to expect? The potential for number-fudging is only exacerbated by the nebulous nature of the “assets” in question because there is no legitimate standard against which such assessments can be judged. For example, one study cited by the NYSE’s rule proposal notes that coral reefs were given estimated values ranging from about \$37,000 per hectare per year to about \$2,100,000 per hectare per year.²⁷ Such variation demonstrates both the absurdity and the potential unreliability of such valuation by experts. Even assuming that a given natural asset has a fixed economic value, that value is inherently inscrutable.

Further, the economic value of natural assets depends on how humans interact with the natural elements one is trying to value. For example, a study at one point in time found that native bees in a region of Costa Rica contributed about \$60,000 a year in pollination services to the local coffee farming industry.²⁸ However, when the price of coffee dropped, the coffee farms were replaced with pineapple farms which don’t need pollination.²⁹ How does the NYSE rule ensure that NACs’ supposed capture of economic value in the natural ecosystem is not dependent on misguided assumptions about the environmental or economic status quo? How will investors be protected from such sudden changes in the “value” of “ecosystem services” and their potential impact on the NACs who hold the rights to those services? In fact, is not the virtue of the market that economic value does not depend on such universal assumptions but is driven by millions of individuals’ and businesses’ assessment of what expenditures produce the greatest return in their particular circumstances?

How do NACs Align with the Mission of the SEC?

Given the unreliability of NAC valuation, how would the SEC’s approval of the NYSE’s proposed rule be consistent with the mission of the SEC? How would the SEC’s enforcement division distinguish a company employing the artifices of a NAC form from a company engaging in fraud? 17 CFR § 240.10b-5 prohibits the use of “any device, scheme, or artifice to defraud,” and the making of “any untrue statement of a material fact” or the failure “to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.” How are NACs anything more than a scheme to lure retail investors or those locked into institutional investors into trusting a corporate scheme the value of which is exaggerated and the purpose of which is not to provide an economic return? How does this protect either the market or investors, the constituencies the SEC exists to protect? What will prevent pension funds from investing in NACs under the pressure of carbon neutrality or ESG but at the expense of their beneficiaries? Would state pension fund managers be permitted under their fiduciary responsibilities to invest in such schemes?

What Steps Have the NYSE and SEC Taken to Neutralize the Significant National Security Threat Posed by the Creation and Listing of NACs?

NACs appear to pose a significant threat to the national security of the United States. America’s enemies are always looking for opportunities to weaken the institutions that sustain American freedom. As such, great care should be taken not to provide those actors with new opportunities to do so; opportunities which here would be even greater than elsewhere because of NACs’ protections from normal corporate requirements. The Chinese Communist Party (“CCP”) is perhaps the most active and

²⁷ Robert Costanza et al., *Changes in the Global Value of Ecosystem Services*, 126 *Global Environmental Change* 152, 155 (Mar 2014).

²⁸ McCauley, *supra* note 15.

²⁹ *Id.*

subtle of these enemies. As AAF founder Former Vice President Mike Pence noted in a 2023 speech at the Hudson Institute, “China is the greatest strategic and economic threat to the United States of America in the 21st century, and we must meet that threat with American strength. The truth is, communist China is playing to win by any means necessary, and China is our rival.”³⁰ The CCP “has exploited American capital, technology, and data to undermine the social and economic principles that define American exceptionalism,”³¹ as AAF has noted elsewhere. It has funded “Confucius Institutes” at U.S. universities, at one time sponsoring about 120 such institutes around the U.S.³² As a result of public and political concern, that number has dropped dramatically, but CCP efforts to influence America have not stopped. Just last year, two men were arrested for their involvement in what was functioning as a Chinese police station in New York city.³³ Similarly, as NPR and other outlets have reported, “Chinese entities slowly are buying up more U.S. farmland,” particularly near military installations.³⁴ As Representative Dusty Johnson of South Dakota noted, “I think we’ve seen that Russia was able to exercise undue influence over Europe because they supplied them [with] so much natural gas. And similarly, if China has control over food supplies in South America, Africa, Southeast Asia, even in North America, that can give them more power, more coercive power, over the globe.”³⁵ Whether from the CCP, another foreign power, or a non-state actor, America’s markets must be secured against hostile meddling.

We assume that NACs would be controlled by the owners of all the shares like a normal, non-fraudulent corporation. “However, as Berle and Means pointed out in their 1932 landmark work, *The Modern Corporation and Private Property*, it is possible to control a corporation without owning all its stock... In a large public corporation with dispersed, passive shareholders, a large minority shareholder may have substantial power to elect directors and influence corporate decisions because of the difficulty and expense of mustering a large opposition block.”³⁶ An important study showed that, “based on the turnover of chief executive officers and board chairmen within a year after large block trades, as little as 5-10% of the stock may wield substantial control.”³⁷ Indeed, the interests of many shareholders may not be dispersed; their desire to keep strategic assets from being developed in the United States out of ecosystem concerns may align with other foreign interests who seek to do us harm in the national security sphere.

³⁰ Mike Pence, Presidential Speech Series at the Hudson Institute at 3, <https://s3.amazonaws.com/media.hudson.org/Pence+Transcript.pdf>.

³¹ Advancing American Freedom, *The Future of Freedom*, https://advancingamericanfreedom.com/wp-content/uploads/2023/05/Future-of-Freedom_China_Compressed.pdf.

³² Rachelle Peterson, Ian Oxnevad, Flora Yan, *After Confucius Institutes: China’s Enduring Influence on American Higher Education*, National Association of Scholars, <https://www.nas.org/reports/after-confucius-institutes/full-report>.

³³ *Two Arrested for Operating Illegal Overseas Police Station of the Chinese Government*, Department of Justice, April 17, 2023, <https://www.justice.gov/opa/pr/two-arrested-operating-illegal-overseas-police-station-chinese-government>.

³⁴ *Id.*

³⁵ Rachel Treisman, *China is buying up more U.S. farmland. Some lawmakers consider that a security threat*, NPR, Mar. 1, 2023 <https://www.npr.org/2023/03/01/1160297853/china-farmland-purchases-house-hearing-competition>.

³⁶ Larry E. Ribstein, *Business Associations* 987 (New York: Matthew Bender & Co. Inc., 2d ed., 1990).

³⁷ *Id.* See Barclay and Holderness, *The Law and Large-Block Trades*, Working Paper Series No. 89-17, Managerial Economics Research Center, William E. Simon Graduate School of Business Administration, University of Rochester (Sept. 1989).

What steps have the SEC and NYSE taken to ensure that America's enemies are not emboldened and enabled if the proposed rule is adopted? The 118-page NYSE filing does not appear to mention, let alone address in any meaningful way, the threat of a non-market actor like the CCP buying into a NAC to lock up the ecological rights to land that contains essential resources like lithium deposits, uranium, oil, or others, and holding them in perpetuity so that they cannot be used. What steps have been taken to ensure that corporations that attempt to purchase such rights are thoroughly vetted to ensure that they are in no way connected to a foreign power? Has the Secretary of the Treasury, the head of the Committee on Foreign Investment in the United States (CFIUS), provided a signed assessment and approval of the dangers posed by NACs? Has Secretary of State Anthony Blinken provided his written assessment of the risks posed by the adoption of the NYSE's rule? Have either the SEC or NYSE produced memoranda evaluating this threat posed by NACs? None of these risks were identified in the proposed rule or accompanying exhibits. It appears that neither the SEC nor the NYSE has considered these risks in a meaningful way.

How Will NACs Perform the Fundamental Purpose of a Corporation: Generating Returns for Investors?

As the Michigan Supreme Court recognized over a century ago, business corporations are "organized and carried on primarily for the profit of the stockholders." *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (Mich. 1919). Even cases that later allowed corporations to act in ways that were not directly beneficial to the corporation and thus its shareholders nonetheless recognized such benefits as the necessary ultimate goal. In *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 161 (N.J. 1953), the New Jersey Supreme Court upheld a corporation's donation to a college because the donation "was voluntarily made in the reasonable belief that it would aid the public welfare and advance the interests of the plaintiff as a private corporation and as part of the community in which it operates."

Such a shareholder-first policy in a free market has benefits for so-called "stakeholders" as well. For example, generally speaking, corporations who pay employees more will be able to find and retain better employees. Better employees will mean higher quality and/or lower priced goods. Higher quality and lower priced goods, in turn, benefit consumers. Those consumers then tend to purchase products that best meet their needs and desires, ultimately benefiting shareholders. In this way, free competition among corporations that are focused on returns for their stockholders will benefit society generally.

On the other hand, the primary purpose of NACs is "to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services."³⁸ Secondly, NACs may "seek to conduct *sustainable* revenue-generating operations" only "where doing so is consistent with the company's primary purpose."³⁹ "Sustainable operation 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."⁴⁰ Thus, "all NACs are prohibited from directly or indirectly conducting unsustainable activities, such as mining [or drilling for oil], that lead to the degradation of the ecosystems it is trying to protect."⁴¹ In other words, NACs may engage in revenue generating activity only in very narrowly defined circumstances. How will NACs reliably provide returns for investors when providing returns is relegated to a secondary objective and is inhibited by the primary

³⁸ Proposed rule 34.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Proposed rule at 26.

objective? What justifies the creation of a new corporate form with such a fundamentally different purpose from existing forms for business corporations?

Is the Equitable Benefit Sharing Policy of the NYSE-Proposed Rule Functional, Much Less Ethical?

The NYSE proposed rule requires that NACs adopt what it calls an “Equitable Benefit Sharing Policy.” That policy would require that “NAC’s common stock distribution [] be completed no later than the time of closing of the NAC’s IPO.”⁴² Further, “If the NAC has entered into a license agreement with respect to public lands, shares representing at least 50% of the shares of the NAC’s outstanding shares as of the closing of the IPO must be distributed to local communities.”⁴³ The same policy applies to private lands, but with a 5% distribution requirement rather than 50%. It is unclear from the rule how this would work.

The common stock must be distributed by the close of the IPO. Does this mean that after the close of its IPO, a NAC could never acquire new interests because it could no longer distribute its stock to local communities? Or does this mean that a NAC can avoid the Equitable Benefits Sharing Policy Requirement simply by waiting until after its IPO has closed to acquire its interest in land? Or does it mean that if it initially acquired an interest in private land only, and then after the close of its IPO acquired an interest in public land, it would have to buy back shares to meet the distribution requirement? If a NAC owns an interest in both private and public land, must it distribute 50% or 55% of its stock to local communities?

In the case of public land, the NAC must distribute 50% of its outstanding shares to local communities. If the NAC acquires interests in public lands in multiple locations, how will it decide to apportion the shares it must distribute? Is it within the NAC’s discretion? Must it distribute the shares equally to each community? Must it distribute the shares proportional to the population of the communities or the relative size of its interests in land? What will prevent a NAC from favoring one local community over another for illegitimate reasons?

Further, what benefit is derived by local communities from these distributions if the NAC doing the distributing does not turn a profit? How does the community benefit from shares that may be unsellable, may well drop in value, and are unlikely to pay dividends? The requirement that NACs adopt an Equitable Benefit Sharing Policy raises far more questions than the proposed rule answers. The SEC should demand greater explanation from the NYSE before confirming its proposed rule.

Concluding Thoughts: Whom Does It Serve?

The NYSE’s proposed rule for the creation and listing of Natural Asset Companies raises far more questions than it answers. It poses a threat to American investors, American securities markets, and American national security. Fundamentally, the NYSE’s proposal, if adopted, would allow for the creation of corporations surrounded by a red line, allowing them to engage in what, in any other context, would constitute fraud on the market. In a recent post on X, Chair Gensler wrote, “Fraudsters continue to exploit the rising popularity of crypto assets to lure retail investors into scams. These investments continue to be

⁴² Proposed rule at 37.

⁴³ *Id.*, at 37-38.

replete w/ fraud- bogus coin offering, Ponzi & pyramid schemes, & outright theft where a project promoter disappears w/ investors' money."⁴⁴ We believe Chairman Gensler should have the same reaction to NACs.

Approving this rule without fundamental changes consistent with centuries of discoveries in Anglo-American jurisprudence and Western economics would be foolhardy and inconsistent with the SEC's anti-fraud mission.

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Advancing American Freedom

Vice President Mike Pence, Founder

⁴⁴ Gary Gensler (@GaryGensler), X, <https://x.com/garygensler/status/1744383657219875110?s=46>, (last visited Jan. 9, 2024).