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SUBMITTED ONLINE VIA:
https://www.sec.gov/rules/sro.shtml.

Sherry R. Haywood
Assistant Secretary
Division of Trading and Markets
Securities and Exchange Commission
100 F Street NE,
Washington, DC 20549–1090

Re: 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 [Release No. 34–98665; File No. SR–NYSE–2023–09] (88 Fed. Reg. 68811 (Oct. 4, 2023)).

Dear Ms. Haywood:

The State of North Dakota ("State" or "North Dakota") submits these comments on the New York Stock Exchange, LLC's ("Exchange" or "NYSE") proposed rule to adopt new listing standards for "Natural Asset Companies" ("NACs") entitled "*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*", published by the Securities and Exchange Commission ("SEC") in 88 Fed. Reg. 68811 (Oct. 4, 2023) ("Proposed NAC Rule"). The SEC has instituted proceedings pursuant to Section 19(b)(2)(B) of the Securities and Exchange Act of 1934 ("Exchange Act") to determine whether to approve or disapprove the Proposed NAC Rule.

North Dakota urges the SEC to disapprove the NYSE's Proposed NAC Rule as it is inconsistent with the requirements of Exchange Act, and unlawfully transforms the NYSE into natural resource and environmental regulatory agency and expands the NYSE's regulatory authority into an area never intended or authorized by Congress. The Proposed NAC Rule goes even further by effectively deputizing the efforts of a single six-year old private for-profit company, the Intrinsic Exchange Group ("IEG"), elevating IEG's untested concepts into Federal securities law. This policy excursion is far afield of the SEC's and the NYSE's statutory authorization and market focused domain, and therefore the Proposed NAC Rule must be disapproved.

North Dakota objects to the Proposed NAC Rule on several fundamental grounds: First, the SEC and the NYSE lack the statutory authority for the Proposed NAC Rule, and the proposal is not supported by the administrative record. Second, the Proposed NAC Rule would unlawfully interfere with North Dakota's sovereign authority to regulate natural resources in the State. Third, the Proposed NAC Rule would improperly preempt North Dakota's authority to regulate securities issued by NACs.

I. North Dakota's Interest in the Proposed NAC Rule

As a major agricultural and energy producing state (from significant lignite coal, oil, natural gas, hydro and wind resources), North Dakota has a sovereign interest in regulating the responsible protection, development and use of its natural resources. The North Dakota Legislature ("Legislature") has long declared it to be an essential government function and public purpose to "foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected . . . ."[1]

The Exchange's Proposed NAC Rule's admittedly novel regulatory framework essentially created and overseen by the newly formed private company IEG adversely affects North Dakota's sovereign interest in regulating the responsible protection and development of the State's natural resources by enabling private NACs to monetize and "lock up" the State's various natural assets, usurping North Dakota's sovereign rights. The Proposed NAC Rule would thus enable and encourage the privatized monetization of North Dakota's natural assets under a narrow ideological regime largely developed by a private for-profit company, all outside of the control or direction of North Dakota or its citizens.

Similarly, North Dakota has a sovereign interest in the regulation of securities impacting its State and natural assets that would be preempted by the Proposed NAC Rule. *See* the National Securities Markets Improvement Act of 1996 ("NSMIA"), Public Law 104–290—OCT. 11, 1996, at 15 U.S.C. § 77r(a)(1)(A) (Preempting State securities regulations for "covered securities."). Thus, NACs listed on the NYSE that wish to manage natural assets in North Dakota in line with IEG's ideological framework would be free of regulatory scrutiny by the North Dakota Securities Department ("NDSD").

II. The NYSE and SEC Lack the Legal Authority to Adopt the Proposed NAC Rule.

The NYSE does not have the authority to effectively federalize the ideological natural asset management theories of IEG into listing requirements for NACs that have nothing to do with, and exceed, the authority granted to the SEC by Congress. To allow otherwise would essentially deputize the NYSE, as a private actor, to exercise governmental land management power that Congress has explicitly delegated to many other federal agencies by allowing the NYSE, and effectively NACs to wield power Congress reserved to other land management agencies such as the Bureau of Land Management ("BLM").

The sole statutory authority listed by the Exchange for the Proposed NAC Rule was as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(1), 19(b)(3)(A)(iii) of the Exchange Act, and Rule 19b–4(f)(6) thereunder. These authorities simply refer to a "self-regulatory organization's" ability to file proposed rules with the SEC, and the process for the SEC approving or disapproving proposed rules. The SEC's ability to approve a proposed rule is contingent on the SEC finding that the proposed rule "is consistent with the requirements of [the

[1] N.D. CENT. CODE § 38-08-01.

Exchange Act] and the rules and regulations issued under [the Exchange Act]". 15 U.S.C. § 78s(b)(2)(C)(i).

Congress stated that the purpose of the Securities and Exchange Act of 1934 was to "provide for the regulation of securities exchanges . . . to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes," having found that "recent disclosures of securities fraud and insider trading have caused public concern about the adequacy of Federal securities laws, rules, and regulations," and "that there is an important national interest in maintaining fair and orderly securities trading, assuring the fairness of securities transactions and markets and protecting Investors." *See* Preamble to the Securities Exchange Act of 1934, June 6, 1934, ch. 404, title I, § 1, 48 Stat. 881.

SEC's authorizing authority to create equity securities such as NACs limits the SEC to authorizing equity securities it determines are "in the public interest or for the protection of investors." 15 U.S.C. § 78c(11). Section 11A of the Exchange Act authorizes the SEC "to facilitate the establishment of a national market system [NMS] for securities." 15 U.S.C. § 78k-1(a)(2). The Exchange Act directs the SEC, "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority" to achieve this goal. *Id.* "Public interest" is not an unbounded term, and the phrase has been interpreted to "be limited to the purposes Congress had in mind when it enacted [the Exchange Act]." *Bus. Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990).

The Proposed NAC Rule admittedly has nothing to do with protecting investors or the markets from inequitable or unfair trading practices or the maintenance of fair and orderly markets. Rather, the stated purposes of the rule include providing investors with "investment vehicles that will allow them to express a sustainability thesis" to address an undocumented "unmet need for an efficient, pure-play exposure to nature and climate," aimed at addressing environmental challenges such as species extinction, water and soil pollution, climate change, etc. 88 Fed. Reg. at 68812. The Proposed NAC Rule aims to end "overconsumption" and "underinvestment in nature" by creating listing standards for NACs that will "hold the rights to ecological performance" of natural assets (through agreements with the private or public natural asset owner) and have the "authority to manage the areas for conservation, restoration, or sustainable management," all of which rights the NAC will be able to license. *Id.*

The Proposed NAC Rule seeks to implement this NAC-based natural resource management strategy largely by the NYSE becoming the sole U.S. licensee of the "Reporting Framework" created by IEG. 88 Fed. Reg. at 68813. IEG is a private for-profit company that claims to have created the concept of NACs and states that it "advise[s] natural asset owners on the formation and structuring of [NACs]." *See* https://www.intrinsicexchange.com/home-1 (last visited January 10, 2024). NAC's would have to generate Environmental Performance Reports based on annual Technical Environmental Performance Studies, all based on IEG's Reporting Framework that has been licensed to the NYSE.

The Proposed NAC Rule would also impose as nationwide Federal listing requirements a number of elements established by the United Nations' System of Environmental-Economic Accounting—Ecosystem Accounting, including obligating NACs to have Environmental and Social

Management Systems and policies on a variety of topics, including biodiversity, human rights, and "equitable benefit sharing." 88 Fed. Reg. at 68815. The Proposed NAC Rule thus appears to be a combination of the business model of a newly-formed private corporation and a sustainability framework developed by the United Nations.

However laudable the various ecological and sustainability policies expressed in the Proposed NAC Rule may be, nowhere in the Exchange Act does Congress grant the authority to the SEC, or to the "self-regulatory organizations" the SEC manages, to establish and impose policies regulating the management of the nation's natural assets. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, (1988); *see also Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("In the absence of statutory authorization for its act, an agency's action is plainly contrary to law and cannot stand.") (internal quotation marks and citations omitted). "To determine whether the agency's action is contrary to law, we look first to determine whether Congress has delegated to the agency the legal authority to take the action that is under dispute." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir.2001); see also id. at 1082 ("Agency authority may not be lightly presumed.").

Recently, in *West Virginia et al. v. Environmental Protection Agency*, the Supreme Court confirmed the major question doctrine's mandate that agencies must point to clear congressional authorization before "claim[ing] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." 142 S.Ct. 2587, 2610 (2023) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). Concurring in the opinion, Justices Gorsuch and Alito further emphasized that the major questions doctrine "seeks to protect against unintentional, oblique, or otherwise unlikely intrusions" into the basic principles of "self-government, equality, fair notice, federalism, and the separation of powers." *Id.* at 2620.

Reflecting "transformative expansion" of its authority, the NYSE does not even attempt to find any express authority in the Exchange Act for what it calls in the Proposed NAC Rule a "transformational solution" to natural asset management. Nor does the Proposed NAC Rule reflect any material coordination with, recognition of, or deference to the several Federal agencies and their State counterparts (including several North Dakota agencies) who, with express Congressional authorization, have been managing the nation's natural assets for generations through long-established statutory and regulatory programs. Indeed, quite the opposite, the NYSE has simply licensed the concepts of IEG, a six-year old private consulting firm whose business it is to promote NACs, along with a handful of United Nations concepts, to create this unique and parallel "transformational solution."

The Exchange Act's central purpose is to "to insure the maintenance of fair and honest markets in [securities] transactions" while seeking "remove impediments to and perfect the mechanisms of a national market system for securities," "impose requirements necessary to make such regulation and control reasonably complete and effective," and "protect and make more effective the national banking system and Federal Reserve System." 15 U.S.C. § 78b. Nowhere in this purpose is a call for the SEC, or the NYSE, to "end[] the overconsumption of and underinvestment in nature" by "bringing natural assets into the financial mainstream." 88 Fed. Reg. at 68812. Simply put, ending

a supposed "overconsumption" of the Nation's natural assets has no ties to the Exchange Act's authorizing authority to ensure "fair and honest" markets in securities transactions. Instead, the NYSE seeks the SEC's blessing to "discover in a long-extant statute an unheralded power" to become a regulator of the Nation's natural resources and implement the IEG's radical agenda outside of Congresses purview. Yet Congress has not granted the SEC, nor the NYSE, such expansive authority.

Instead, Congress authorized the SEC and NYSE to promulgate regulations and rules aimed at achieving stable, fair and transparent securities markets that investors can rely on, not launch transformational natural resource management initiatives that are in the remit of several other Federal agencies and their State counterparts through a cooperative federalism framework established by Congress (e.g., the Department of Agriculture, Department of Interior, Environmental Protection Agency, Department of Energy, etc.). The NYSE's own statements describing the Proposed NAC Rule reveal how this rule smashes through the jurisdictional guardrails set by Congress: "The NAC is a transformational solution whereby natural ecosystems are not simply a potential resource to extract, but an investible productive asset which provides financial capital to responsible stewards of ecological resources." https://www.nyse.com/introducing-natural-asset-companies (last visited January 10, 2024). The Proposed NAC Rule has no ties to the Exchange Act's authorizing purpose and authority, and the SEC must disapprove the NYSE's proposed rule.

II. The Proposed NAC Rule Creates Conflicts of Interest.

The Proposed NAC Rule not only exceeds the SEC's and NYSE's authority under the Exchange Act's, but also creates conflicts of interest by creating financial incentives for both the NYSE and the IEG to promote the unlawful NAC model. First, the NYSE has acquired a minority ownership interest in the IEG (as well as a seat on the IEG's board of directors), the private for-profit company that will profit from the Proposed NAC Rule. *See* 88 Fed. Reg. at 68813. Second, the IEG is given a direct financial interest in the Proposed NAC Rule by being "entitled to a share of the revenues generated by the Exchange from the listing and trading of NACs on the NYSE." *Id.*

The NYSE's direct financial interest in the Proposed NAC Rule belies the NYSE's assertion that the proposed rule "is consistent with the protection of investors and the public interest." 88 Fed. Reg. at 68817. Rather than the public benefiting from the IEG's untested and unquantified concepts being codified into federal securities law, it is the NYSE and the IEG who will directly benefit from the Proposed NAC Rule at the expense of investors and the general public. This is compounded by the Proposed NAC Rule's deputization of the NYSE and IEG to lock up public and private natural resources and control the Nation's natural resource assets, thus actually harming the general public.

III. Existing Federal Statutes Delegating Land Use and Natural Asset Management Authority to Other Existing Federal Agencies Confirm the Proposed NAC Rule is Outside the SEC and Exchange's Authority.

The Proposed NAC Rule's almost complete reliance on a private consulting firm's business model and United Nation's reports demonstrates that the SEC and NYSE have no natural asset

management authority, experience or expertise of their own, in sharp contrast to the generations of deep experience of the many Federal and State agencies with actual lawful jurisdiction over the nation's natural assets. For example, there are a series of Federal natural asset management statutes dating back to the 19th century that the Proposed NAC Rule completely ignores, including the Federal Land Policy Management Act of 1976 ("FLPMA"), the Mineral Leasing Act ("MLA"), the Organic Act of 1916, the Forest Reserve Act of 1891, the Taylor Grazing Act of 1934, the Multiple Use Sustained Yield Act of 1960, and the National Environmental Policy Act of 1970 ("NEPA").

FLPMA is a land use planning and management statute which "established a policy in favor of retaining public lands for multiple use management." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 877 (1990). "Multiple use management" describes the task of striking a balance among the many competing uses to which land can be put, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values." *Norton v. S. Utah Wilderness All.,* 542 U.S. 55, 58 (2004) (citing to 43 U. S. C. § 1702I). A second management goal, "sustained yield," requires the Bureau of Land Management ("BLM") to control depleting uses over time, so as to ensure a high level of valuable uses in the future. *Id.* (citing to 43 U.S.C. § 1702(h)). "To these ends, FLPMA establishes a dual regime of inventory and planning. Sections 1711 and 1712, respectively, provide for a comprehensive, ongoing inventory of federal lands, and for a land use planning process that 'project[s]' 'present and future use,' § 1701(a)(2), given the lands' inventoried characteristics." *Id.* Under these mandates, "FLPMA identifies 'mineral exploration and production' as one of the 'principal or major uses' of public lands."

Similarly, the MLA provides that mineral resources on public lands "shall be subject to disposition" (30 U.S.C. § 181) and statutorily directs the Secretary of the Interior to hold lease sales disposing of such lands, "at least quarterly" (30 U.S.C. § 226(b)). Those quarterly lease sales are required to comply with NEPA environmental analyses, by which Congress has statutorily codified a regulatory regime that carefully requires federal agencies to consider the environmental impacts of such actions.

These, and other Federal natural asset management programs, operated in conjunction with their State counterparts in a cooperative federalism framework established by Congress that respects States' sovereign authority granted by the 10th Amendment to the U.S. Constitution. Indeed, the "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *accord City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States"); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 174 (2001) ("States have a constitutional right to maintain their "traditional and primary power over land and water use."); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). *Hess v. Port Authority TransHudson Corp.,* 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

Further, by attempting to allow NAC's to control the management of public lands already under the jurisdiction of other federal agencies such as the BLM, the Proposed NAC rule represents an unconstitutional delegation of governmental authority to a private party. It is clearly established

that "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Nat'l Horsemen's Benevolent & Prot. Ass'n v. Black*, 53 F.4th 869, 881 (5th Cir. 2022). By granting NAC's the ability to "hold the rights to the ecological performance of a defined area and have the authority to manage the areas for conservation, restoration, or sustainable management" the Proposed NAC Rule purports to delegate the Department of Interior's (and not the SEC's or NYSE) statutory authority to private for-profit company operating pursuant to a model created by a private company that will profit from the NYSE's imprimatur. 88 Fed. Reg. at 68814. Further, as set forth in Section IV, *infra*, this would directly interfere with North Dakota's sovereign authority to regulate its own state and private natural resources, including interfering with the North Dakota Industrial Commission's, the North Dakota Department and Trust Lands', the North Dakota Department of Agriculture's, and the North Dakota Public Service Commission's authority over State natural resources.

Further reflecting the SEC's and NYSE's lack of authority, expertise or competence in this area, other than citing to a handful of theoretical articles on "ecosystem services" and global sustainability, the administrative record for this rulemaking does not contain any data or studies of natural asset management in the United States that identify or evaluate the "problem" that this "transformational solution" is trying to solve, or evaluating either the costs or benefits of this "transformational solution." This rulemaking relies only on limited number of vague and high-level statements about "species extinction," the consumption of fresh water, pollution, wrapping up with the assertion that "these are significant threats to life on earth and the economy." Absolutely no attempt is made to specify or quantify these "significant threats," either in ecological or economic terms. Dramatic statements such as "because financial markets do not include the positive and negative externalities related to nature's consumption and production, ecosystem services are being degraded at alarming rates," are not accompanied by any specific evidence on how environmental issues are addressed by financial markets in the U.S., or any specific evidence that the approach of U.S. financial markets is causing ecosystems to be degraded "at an alarming rate" (or which specific ecosystems are being depleted, why they are being depleted, and what the "alarming rate" is).

The Proposed NAC Rule is also characterized by one-sided statements such as "agriculture is contributing to the loss of natural habitat and soil degradation," without any discussion of the necessity of agriculture to feed human populations, the significant advances that have been made in sustainable agricultural practices, etc. This is an important issue for North Dakota, given the importance of the agricultural sector to North Dakota's economy and North Dakota's substantial contribution to feeding the nation and the world. Thus the SEC's and NYSE's "transformational solution" is a solution looking for a problem, reflecting none of the scientific or data-based analysis that is expected of any natural asset rulemaking initiated by any agency entrusted by Congress or the States to manage natural assets.

In addition to the absence of anything approaching adequate problem definition, the Proposed NAC Rule provides absolutely no objective support, data, or analysis demonstrating that the "transformational solution" will actually work. After concluding that "ending the overconsumption of and underinvestment in nature requires bringing natural assets into the financial mainstream" (without providing any specific evidence/analysis of overconsumption/underinvestment in nature in the U.S. or that natural assets are outside of the

financial mainstream), the NYSE segues "to that end, the Exchange proposes to adopt listing standards to introduce a new type of public company called a NAC, a new concept pioneered by Intrinsic Exchange Group Inc. (''IEG'')." However, there is nothing objective in the record, such as data or studies based on real-world data, demonstrating that the Proposed NAC Rule will "end overconsumption of and underinvestment in nature," will stop the alleged "alarming rate" of ecosystem degradation, or is a good or well-accepted approach to enhancing the consideration of natural assets in financial markets. Indeed, the new concept being licensed by the NYSE from a private consulting firm in which the NYSE has a financial interest is the only option being considered in this rulemaking.

Supported by only broad high-level assertions, without any serious factual, scientific or economic evidence in the administrative record, the Proposed NAC Rule is arbitrary and capricious.

IV. The Proposed NAC Rule Would Violate Long-Established Principles of Cooperative Federalism and Would Impair North Dakota's Sovereign Right to Manage State and Private Natural Resource Assets.

Under a long history of cooperative federalism, Congress has recognized North Dakota's (and all States') sovereign rights to protect, develop and regulate private and state natural assets in its various land use statues, including the MLA and FLPMA. For example, in the MLA Congress explicitly reserved authority to the States, noting that "[n]othing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have." 30 U.S.C. § 189; *see also* 30 U.S.C. § 187 (No leases issued by the Secretary of the Interior "shall be in conflict with the laws of the State in which the leased property is situated.").

Similarly, FLPMA recognizes the need for a partnership between the States and the federal government for long term land use planning and management in achieving FLPMA's "established a policy in favor of retaining public lands for multiple use management." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 877 (1990). "To these ends, FLPMA establishes a dual regime of inventory and planning. Sections 1711 and 1712, respectively, provide for a comprehensive, ongoing inventory of federal lands, and for a land use planning process that 'project[s]' 'present and future use,' § 1701(a)(2), given the lands' inventoried characteristics." *Norton v. S. Utah Wilderness All.,* 542 U.S. 55, 58 (2004). During the land use planning process, the federal government is required to include the states in developing comprehensive "Resource Management Plans" that set forth how FLPMA's "multiple use management" mandate will be achieved in each State. FLPMA's multiple use "identifies 'mineral exploration and production' as one of the 'principal or major uses' of public lands." *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237, 241 (D.D.C. 2020) (citing to 30 U.S.C. § 1702(l)). Of particular importance here, FLPMA requires that the "Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands." 43 U.S.C. § 1712(f).

North Dakota, acting within this cooperative federalism framework and through its legislature and several agencies, has for generations exercised its sovereign authority to effectively protect and manage the natural assets in the State for the benefit of its citizens. These agencies include the:

- North Dakota Industrial Commission (and its Department of Mineral Resource, Oil and Gas Division) which encourages and promotes the development, production, and utilization of oil and gas in the State in such a manner as will prevent waste, maximize economic recovery, and fully protect the correlative rights of all owners to the end that all owners, producers, and the general public realize the greatest possible good from these natural resources;
- North Dakota Department of Trust Lands, which has a fiduciary responsibility to manage State Trust Lands in a manner that is in the best interest of North Dakota's schools, and for which mineral development is a critical beneficial use of those State Trust Lands;
- North Dakota Department of Agriculture, which administers the North Dakota Corporate or Limited Liability Company Farming Act ("Farming Act"), which places restrictions on the ability of corporations to own or engage in the business of farming and ranching in North Dakota (*see* N.D. CENT. CODE § 10-06), ensuring that investments in agriculture and ranching in North Dakota are owned and managed by North Dakotans, and ensures that North Dakota's goals of sustainable development in farming and ranching are implemented; and
- North Dakota Public Service Commission, which administers electric and gas utility regulation, energy transmission and generation siting consistent with minimal impacts on the environment and public welfare, surface coal mining and reclamation, and the elimination of hazards from abandoned mine lands.

The NYSE (and SEC) does not have the authority to simply ignore and bypass the centuries-old Constitutional, Federal and State natural asset planning structure reflected in comprehensive Federal and State statutes implemented by Federal and State agencies with enormous experience in natural asset management. The Proposed NAC Rule would unlawfully usurp this long-established Federal-State natural asset management system by enabling and obligating NACs to manage natural assets without reference to existing law and agency expertise, using a framework licensed from a private consulting firm, buttressed by United Nations concepts.

The complete absence of any Congressional authority for the NYSE to launch natural asset regulatory initiatives, combined with Congress' more than century-old express authorization of natural asset regulation through a comprehensive Federal-State partnership of long-established agencies, along with the complete absence of any institutional experience and expertise in natural asset management, demonstrate the complete failure of the Proposed NAC Rule to satisfy the major question doctrine. Further, the absence of any material or persuasive evidence in the administrative record supporting either the alleged problem to be solved or the ability of the "transformational solution" to solve it reveals that what the NYSE is proposing to do is arbitrary and capricious. Finally, the NYSE's misguided effort to wade into the complex issues of natural asset management should not be granted any deference because they have neither the requisite authority or expertise. "Administrative knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency'." *Kisor v.*

Wilkie, 139 S. Ct. 2400, 2417 (2019) (quoting *Martin v. Occupational Safety and Health Review Com'n*, 499 U.S. 144, 153 (1991)).

Nor should the NYSE, in an effort to solve what it perceives to be a major global problem, be allowed to occupy the natural asset management space that Congress long ago reserved for several Federal agencies and their State counterparts. The Proposed NAC Rule "represents an attempt by one federal agency to reallocate, on its own initiative, the regulatory responsibilities Congress has purposefully divided among several different agencies." *American Bankers Ass'n v. S.E.C*, 804 F.2d 739 (D.C. Cir. 1986).

V. The Proposed Rule Would Preempt The North Dakota Securities Department's Authority to Regulate the Offer and Sale of Securities in North Dakota and Would Upend Long Established North Dakota Securities Regulations.

Not only does the Proposed NAC Rule unlawfully transform the NYSE into a national natural asset regulator (along with its deputized licensor, IEG), the rule would also preempt and bar any regulation of the issuance of NAC securities by the NDSD.

The NDSD protects investors and supports legitimate capital formation. The NDSD is the regulatory agency responsible for the administration of the North Dakota Securities Act (N.D. CENT. CODE § 10-04), the North Dakota Commodities Act (N.D. CENT. CODE § 51-23), the Franchise Investment Law (N.D. CENT. CODE § 51-19) and Pre-Need Funeral Services Law (N.D. CENT. CODE § 43-10.1).

The NDSD's responsibilities include overseeing securities which include interests or participation in natural assets, including oil, gas, or mining title lease and in payments out of production under such title or lease. N.D. CENT. CODE § 10-04-02(19). The NDSD has safely and responsibly regulated these types of securities under its blue sky laws for decades as authorized by the North Dakota Securities Act.

However, pursuant to NSMIA, with the exception of the preservation of fraud enforcement authority, the NDSD's ability to protect investors in this newly created security would be largely eliminated: the Proposed NAC Rule would create a new class of "covered securities" – NACs – and thus preempt North Dakota's authority and ability to regulate the issuance of securities by NAC's that wish manage natural assets in North Dakota. *See* 15 U.S.C. § 77r(a)(1)(A). This is an abuse of Congress' purpose in enacting NSMIA, which was designed to encourage the free-flow of capital to and through nationally-recognized securities exchanges such as the NYSE. *See* NSMIA, Public Law 104-290 (Declaring the purpose of NSMIA as "promot[ing] efficiency and capital formation in the financial markets, and to amend the Investment Company Act of 1940 to promote more efficient management of mutual funds, protect investors, and *provide more effective and less burdensome regulation.*" (emphasis added)). The Proposed NAC Rule has nothing to do with enabling the free flow of capital in national markets; to the contrary, it seeks to enable and impose a narrow (and privately created and licensed) ideological vision of natural asset management that, if anything, will constrain not encourage the free flow of capital. Under the guise of creating a new class of "covered securities," the SEC and NYSE seek to impose on the States a "transformational solution" that enables NACs to manage North Dakota's natural assets

through a untested framework licensed from a private consulting firm and completely evade review by the NDSD.

This adverse impact is compounded by the imposition of a series of one-size-fits-all ideologically-driven environmental, natural resource, and social policy requirements that have nothing to do with investor protection. Thus the Proposed NAC Rule would remove the investor protections provided by North Dakota law, while enabling private NACs to advance the imposition of the ideological IEG and United Nations requirements on the management of natural assets in North Dakota.

The Proposed NAC Rule would thus exploit federal law pre-emption provided for exchange listed securities, allowing NACs to evade NDSD regulation that provides critical investor protections in favor of "conservation" goals based on the work of a private consulting firm and the U.N. that the NYSE does not have the authority to impose.

VI. Conclusion.

The Proposed NAC Rule exceeds the Exchange Act's authorizing authority and purpose by transforming the NYSE into a natural resource and environmental regulatory agency never intended or authorized by Congress, and is not supported by the administrative record. The Proposed NAC Rule would also improperly preempt North Dakota's authority to regulate securities issued by NACs. Finally, the Proposed NAC Rule is aimed at regulating the use of natural resources, not securities, and would unlawfully interfere with North Dakota's sovereign recognized rights to regulate natural resources in the State. Therefore, the SEC must reject the NYSE's unlawful overreach and disapprove the Proposed NAC Rule.

Sincerely,

Doug Burgum
Governor