



## VIA ELECTRONIC FILING

Christina Z. Milnor  
Assistant Secretary  
U.S. Securities and Exchange Commission

**RE: Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the NYSE Listed Company Manual To Adopt Listing Standards for Natural Asset Companies [File No. SR-NYSE-2023-09].**

Ms. Milnor:

Please see the below comments from the America First Policy Institute (AFPI) regarding the order instituting proceedings to determine whether to approve or disapprove a proposed rule change to amend the New York Stock Exchange (NYSE) listed company manual to adopt listing standards for natural asset companies (88 Fed. Reg. 89788, December 28, 2023, File No. SR-NYSE-2023-09).

AFPI appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC's) proposed rule ("the proposal" or "the proposed rule").

### **The America First Policy Institute**

AFPI is a 501(c)(3) nonprofit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do. One of AFPI's core priorities is ensuring that American consumers enjoy reliable and affordable access to energy and transportation, which is instrumental to a prosperous America.

### **Introduction**

Dynamic and competitive capital markets are fundamental to the economic well-being of the United States. These markets function best when the nature of financial assets or products is



clear and when investors have faith in the legality of their investments. By contrast, opacity and legal uncertainty provide opportunities for deception and turmoil.

The SEC is considering a proposal by the New York Stock Exchange LLC (the “NYSE” or the “Exchange”) to allow the listing on the Exchange of common equity securities for natural asset companies (NACs). Rather than facilitating investor choice and financial innovation, the proposal risks allowing the listing of corporations with deeply ambiguous financial value and weak legal legitimacy. Unlike conventional corporations, NACs do not primarily serve to generate financial revenue but instead seek to support the production of goods or services that rarely can be monetized. This is because these goods and services are often non-rivalrous, meaning that they can be used by many people at the same time, and/or non-excludable, meaning third parties cannot be excluded from enjoying their benefits, such as with oxygen produced by plants.

Investors currently have the ability to allocate capital to support the production of these goods and services without the need to list NACs and invite the resulting drawbacks. The potential absence within NACs of assets with market prices provides an opportunity for deception and fraud. Allowing the licensing of vague or non-tangible assets by federal government agencies in the absence of explicit congressional authorization suggests a clear conflict with the Constitution of the United States, calling into question the utility of their listing amid such legal uncertainty. The federal government’s licensing of such assets also poses a potential burden to the public enjoyment of public lands. For these reasons, we request that the SEC withdraw this proposed rule.

### **What is a NAC?**

NACs differ substantially from conventional corporations because they seek to produce goods and services that can rarely be monetized. The SEC makes clear that NACs do not serve primarily to generate financial revenue.<sup>1</sup> Rather, what they produce are “ecosystem services.” According to the SEC:

A NAC is a corporation whose primary purpose is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their *production of ecosystem services* [emphasis added]. In addition, where doing so is consistent with the company’s primary purpose, the company will seek to conduct sustainable revenue-generating operations.<sup>2</sup>

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<sup>1</sup> The SEC’s proposed rule, as published in the Federal Register, relies heavily on information provided by the NYSE. Due to the SEC’s formal authorship of the proposed rule, this information is attributed to the SEC throughout this comment.

<sup>2</sup> The proposed rule was initially published in the Federal Register on October 4, 2023; however, on November 7, 2023, the SEC created a longer period within which to approve the proposed rule change. A second request for



In the initial notice of the proposed rulemaking, the SEC explains that examples of ecosystem services include “clean air, water supply, flood protection, productive soils for agriculture, climate stability, habitat for wildlife, among others.”<sup>3</sup> NACs would acquire license rights from landowners to perform these services (“ecological performance”). Citing academic research by Costanza et al. (2014), the SEC suggests that the annual value of these services could be more than \$100 trillion each year.<sup>4</sup>

The SEC does not include the caveats that Costanza et al. (2014) attach to their calculations. The authors note that they “want to make clear that expressing the value of ecosystem services in monetary units does not mean that they should be treated as private commodities that can be traded in private markets.”<sup>5</sup> This is, in part, because ecosystem services are often used by many people at the same moment (or are “non-rival”) and because it is impossible to prevent third parties from enjoying these services (meaning they are “non-excludable”). Costanza et al. (2014) explain that “[m]ost ecosystem services are public goods (non-rival and non-excludable) or common pool resources (rival but non-excludable), which means that privatization and conventional markets work poorly, if at all.”<sup>6</sup>

In practice, these inherent characteristics risk rendering a NAC productively redundant for an investor. For example, an investment in a NAC that seeks to produce more oxygen through planting trees does not offer a direct return to the investors: many people can breathe their new oxygen, and there is no practical way to stop them from doing so without paying. In the absence of a clear financial or productive benefit accruing to investors, the purpose of a NAC appears less tangible. In describing the potential demand for NACs, the SEC writes that:

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comment was published in the Federal Register on December 28, 2023. This comment responds to the latter request but also makes reference to relevant information published in the initial request for comment, where appropriate. See 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, 88 FR 68811 (proposed September 29, 2023). <https://www.federalregister.gov/documents/2023/10/04/2023-22041/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>.

<sup>3</sup> See 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, 88 FR 68811 (proposed September 29, 2023). <https://www.federalregister.gov/documents/2023/10/04/2023-22041/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>.

<sup>4</sup> See 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, 88 FR 68811 (proposed September 29, 2023). <https://www.federalregister.gov/documents/2023/10/04/2023-22041/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>.

<sup>5</sup> Costanza et al (2014). *Changes in the global value of ecosystem services*, Global Environmental Change, 26, 152–158. <https://doi.org/10.1016/j.gloenvcha.2014.04.002>. P157.

<sup>6</sup> Costanza et al (2014). *Changes in the global value of ecosystem services*, Global Environmental Change, 26, 152–158. <https://doi.org/10.1016/j.gloenvcha.2014.04.002>. P154.



Improvements in corporate disclosures, the introduction of climate and nature-focused indices, and the development of ESG funds screening for preferred or prohibited factors have all expanded the accessibility of sustainable investing. Despite these advances, however, investors still express an unmet need for efficient, pure-play exposure to nature and climate.<sup>7</sup>

Facilitating portfolio “exposure to nature and climate,” rather than economic production, thus constitutes the defining rationale for the creation of NACs.

### **Are there existing alternatives?**

Investor choice facilitates vibrant capital markets, and the SEC should consider whether the creation of NACs substantially increases this choice. Investors have a variety of existing options to allocate resources in support of ecosystem services and achieve “exposure to nature and climate.” In the initial notice of the rulemaking, the SEC recognizes that these options are manifold but takes issue with how they are assessed by traditional measures for financial performance, saying:

Capital flows directed to biodiversity conservation, renewable energy, regenerative agriculture, and other direct investments needed to facilitate a transition to a sustainable economy are insufficient due in part to the inability to transparently present the economic case to access these investment dollars based on traditional measures for financial performance.<sup>8</sup>

If traditional measures for financial performance do not “present the economic case” for a certain allocation of resources, it is not incumbent upon the SEC to engineer the listing of a new type of public company to skew the perspective of private investors. Exactly as the SEC has done in the initial proposed ruling, private investors are capable of conveying that “traditional measures for financial performance” may not completely reflect the production of ecosystem services that

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<sup>7</sup> See 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, 88 FR 68811 (proposed September 29, 2023). <https://www.federalregister.gov/documents/2023/10/04/2023-22041/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>.

<sup>8</sup> See 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, 88 FR 68811 (proposed September 29, 2023). <https://www.federalregister.gov/documents/2023/10/04/2023-22041/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>.



do not tangibly accrue, financially or otherwise, to investors. This is an issue of presentation and investor preference, not investor choice.

### **What are the potential shortcomings or abuses of NACs?**

Allowing common equity securities for NACs to be listed thus would not substantively expand investor choice. However, it would present several potential legal conflicts or opportunities for misuse, which the SEC should heed. The most significant potential abuse of NACs is their use for consumer or investor deception or fraud. In the proposed rule, the SEC notes that:

while the core purpose of a NAC would be to maximize ecological performance, a NAC would also be required to seek to conduct sustainable revenue-generating operations (*e.g.*, eco-tourism in a natural landscape or production of regenerative food crops in a working landscape) provided that such operations are consistent with the NAC's charter, do not cause any material adverse impact on the condition of the natural assets under the NAC's control, and seek to replenish the natural resources being used.

Within a single NAC, there is potentially a clear, practical distinction between financial flows from conventional revenue-generating operations and the financial expression of ecosystem services that do not result in revenue. Simple descriptions of the growth of assets and the return on investment may mislead investors into believing that increasing ecosystem services is inherently related to potential financial revenue. While this may be the case in some contexts, such as proven ecotourism destinations, this link is not guaranteed. Moreover, because of the aforementioned limitations on the commodification of public goods, descriptions of assets owned by NACs may mislead third parties in cases of company closure. For example, a NAC's production of oxygen may be expressed as a financial value, yet upon bankruptcy, there is no clear market for these assets beyond their purchase by other NACs.

In addition to this potentially damaging abuse of NACs, their listing on the NYSE risks facilitating the investor turmoil associated with the unconstitutional management of federal lands, which, furthermore, has the potential to limit the public's enjoyment of those lands. Within the proposed rule, the SEC notes that:

NACs would acquire the ecological performance rights of a designated area by entering into an agreement with the natural asset owner (*e.g.*, a *governmental entity* or private landowner) to obtain a license with respect to such rights [emphasis added].



The SEC also notes that “NACs would be expected to license these rights from *sovereign nations* or private landowners” (emphasis added).

The SEC thus anticipates that governmental entities could issue exclusive licenses for ecological performance on public land. The federal government is the largest single landowner in the United States, and it is not inconceivable, based on these words from the SEC, that efforts would be made to license ecological performance on federal lands. However, in the absence of legislation allowing such licenses, they would be inconsistent with Article IV, Section 3, Clause 2 of the U. S. Constitution, which affords Congress the right to regulate the use and dispossession of federal lands, as follows:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Developing regulations for the listing of NACs, knowing that they are expected to acquire rights that lack legal authorization, risks precipitating investor turmoil.

Moreover, the practical implication of issuing these ecological performance rights to NACs illustrates the importance of this constitutional provision. Without an act of Congress, these federal licenses constitute a direct challenge to the public’s enjoyment of the Nation’s shared assets. For example, the American public enjoys a general right to camp on federal lands.<sup>9</sup> Issuing licenses to NACs for habitat restoration on these lands would likely prevent the public from enjoying this right. That private individuals, corporations, or even foreign public and private investors could prevent the public enjoyment or economic development of federal lands by acquiring a NAC or facilitating its control of an ecological performance right should be sufficient reason to withdraw the proposed rule.

## Conclusion

The integrity of the NYSE is substantially derived from the transparency and legal validity of the assets owned by the companies listed on the Exchange. The proposal to list common equity securities for NACs would not advance this transparency or legal certainty. Rather, without expanding legitimate investor choice, it would risk inviting deception or fraud by conflating

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<sup>9</sup> U.S. Department of the Interior, Bureau of Land Management. *Camping on Public Lands*. <https://www.blm.gov/programs/recreation/camping>



financial revenue with vague notions of value while facilitating trade in legally dubious assets, the effect of which would be to limit the public's enjoyment or development of federal lands. The proposed rule does not put the American public, investors, or capital markets first, and for these reasons, we request that the SEC withdraw this proposed rule.