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February 1, 2024

The Honorable Gary Gensler
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: 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, 88 Fed. Reg. 89,788 (December 28, 2023); File No. SR-NYSE-2023-09

Dear Chairman Gensler:

This letter comments on the Securities and Exchange Commission ("SEC")'s order instituting proceedings to determine whether to approve or disapprove the New York Stock Exchange ("NYSE")'s proposed rule change to adopt listing standards for Natural Asset Companies ("NACs"). The SEC issued the order on December 28, 2023.[1] On January 17, 2024, the NYSE withdrew the proposed rule change.[2] We comment on issues presented by commenters and other issues in light of the NYSE's withdrawal of the rule.

Simply put, this episode is nothing short of an embarrassment for the NYSE. The NYSE submitted a rule that clearly had not been vetted by relevant experts or policymakers. As described in the comment below, the rule proposed listing a class of "companies" that had no apparent previous recognition, that would be barred from making profits except where doing so would "maximize ecological performance," and that would report junk financial metrics assigning monetary value to "natural assets"—such as, for example, nature's "[s]piritual, artistic, and symbolic services"[3]—as if they were audited SEC filings. "The value of nature to life on earth is readily

[1] SEC Release No. 34-99225, 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 (Dec. 21, 2023).
[2] SEC Release No. 34-99355, Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Withdrawal of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies (Jan. 17, 2024).
[3] *See infra* note 167.

apparent," the NYSE's notice melodramatically began.[4] This was not a serious proposal by the world's leading stock exchange.

Yet the NYSE was unfortunately all too serious. The president of the NYSE was even involved, calling NACs an "innovative mechanism" that would "drive meaningful progress on ESG issues."[5] The NYSE was evidently so confident in the rule's prospects that it made a financial investment in the private company behind the idea, the Intrinsic Exchange Group ("IEG"), securing a seat on IEG's board of directors.[6] The NYSE began marketing NACs prominently on an NYSE website landing page.[7] The NYSE lauded the proposed rule as "[e]nding the overconsumption of and underinvestment in nature" by "bringing natural assets into the financial mainstream."[8] Together, the NYSE and IEG aimed to "transform our industrial economy into one that is more equitable."[9]

These lofty plans collapsed immediately on their first contact with reality. After the NYSE submitted the proposal for SEC approval and the SEC instituted proceedings, hundreds of commenters pointed out the rule's obvious and fatal mistakes. Just over three months after first submitting the rule, the NYSE withdrew it and scrubbed NACs from its website. "Pride goeth before a fall."[10]

National stock exchanges are afforded immense privileges, including regulatory preferences and exemptions from antitrust law. In exchange for these privileges, stock exchanges are subject to SEC oversight to see that they are managed in the public interest and to protect investors. The NYSE has abused these privileges in submitting the NACs rule. As explained in the comment below, the NACs rule was not even colorably consistent with the Exchange Act. The NYSE's reckless attempt to have the SEC approve the NACs rule was more than an embarrassing waste of time, effort, and resources. It demonstrated that the NYSE does not take its legal obligations seriously.

The SEC's oversight of the NYSE is not limited to reviewing rule changes. The SEC oversees the NYSE's continuing obligation to enforce its rules and carry out the

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[4] *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 Fed. Reg. 68,811, 68,812 (Oct. 4, 2023).
[5] Press Release, NYSE and Intrinsic Exchange Group Partner to Launch A New Asset Class to Power a Sustainable Future (Sept. 14, 2021), http://tinyurl.com/m55677j.
[6] 88 Fed. Reg. at 68,813 (Oct. 4, 2023).
[7] *Natural Asset Companies (NACs)*, NYSE, https://perma.cc/2WUC-7J3E (last visited Jan. 17, 2024). The NYSE has since taken down this page from its website.
[8] 88 Fed. Reg. at 68,812.
[9] Press Release, *supra*, note 5.
[10] *Proverbs* 16:18 (KJV).

purposes of the Exchange Act.[11] The SEC has the power to add to or delete from the NYSE's rules and impose other limits on its business.[12] In light of these obligations, the NACs rule has highlighted other potential concerns with NYSE Regulation's administration of the exchange rules.

The NYSE's submission of the NACs rule was unbecoming of a national stock exchange. It undermined confidence in the impartiality of the exchange's approach to regulation, which has bearing on all manner of issues. If the NYSE thought it could propose a rule that accepted illegality and defrauding investors as the necessary cost of "meaningful progress on ESG issues," the question is: where else has the NYSE accepted this unlawful tradeoff?

For example, the NYSE enforces listing rules concerning financial reporting and communication of company information with the public. Does the NYSE's guidance providing for "Best Practices for Sustainability Reporting"[13]—which, despite purporting to be "voluntary," still "facilitate[s] companies moving forward on their ESG disclosure"[14]—impede the NYSE's enforcement abilities? Will the NYSE enforce failures to disclose required information if a company does so while complying with the NYSE's "Best Practices" on sustainability?

The NYSE's seemingly careless sponsorship of the NACs rule raises broader questions. How are the NYSE's rule change and enforcement priorities affected by Intercontinental Exchange's membership in the United Nations' Sustainable Stock Exchanges Initiative?[15] Is the Initiative's mission to "promote responsible investment in sustainable development and advance corporate performance on environmental, social and governance issues"[16] consistent with the purposes of the Exchange Act? Why does the NYSE's website point listed companies looking for reporting guidance to ESG activist pressure groups like the Carbon Disclosure Project, Ceres, and UN Global Compact?[17] The NACs rule may have been the tip of an iceberg.

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[11] *See* 15 U.S.C §§ 78f(b)(1), 78f(b)(6), 78s(g)(1).
[12] *Id*. § 78s(c), (h).
[13] *New York Stock Exchange ESG Guidance: Best Practices for Sustainability Reporting*, NYSE, http://tinyurl.com/mtfcj3m4 (last visited Feb. 1, 2024).
[14] *Id*.
[15] *Sustainable Stock Exchange Statement*, ICE, http://tinyurl.com/3nzvdesz (last visited Feb. 1, 2024).
[16] *About the SSE Initiative*, SUSTAINABLE STOCK EXCH. INITIATIVE, http://tinyurl.com/2kbkz7wj (last visited Feb. 1, 2024).
[17] *ESG Disclosure Guidance*, ICE, http://tinyurl.com/yjykwrxk (last visited Feb. 1, 2024).

The NACs rule's obvious and fatal errors suggest a lack of oversight that may affect other matters. The comment below discusses these errors and the rule's impropriety under the Exchange Act.

TABLE OF CONTENTS

I. Introduction 1

II. Summary of Comments 4

III. Background 5

IV. Comment 10

A. NACs Are An Unproven Concept Unsuited for Listing on a National Securities Exchange. 10

1. NACs have undergone no market testing and have no track record of success. 10

2. NACs lack demonstrated investor demand. 11

3. NACs' operating and monitoring costs would have exceeded any financial value to investors. 13

B. NACs Have No Apparent Legal Basis in Private Law. 16

1. NACs are not legal under U.S. state corporation law. 17

2. NYSE provided no evidence that NACs can be organized under the laws of any foreign jurisdiction. 20

3. Ecological performance rights are not legal property. 22

C. The Listing Standard Was Vague and Would Have Invited Abusive Listings and Practices. 23

1. The listing standard's novel accounting method would have exposed investors to fraud and manipulative practices. 24

2. The listing standard's novel corporate governance mechanisms would have exposed investors to fraud and manipulative practices. 31

D. The Listing Standard Was Designed To Regulate Matters Unrelated to the Purposes of the Exchange Act. 34

1. The listing standard was designed to regulate land use, not securities transactions. 35

2. The listing standard would have inverted state corporation law. 36

V. Conclusion 38

I've got some ocean front property in Arizona

From my front porch, you can see the sea

I've got some ocean front property in Arizona

If you'll buy that, I'll throw the Golden Gate in free

— George Strait

I. Introduction

The NYSE sought to establish a new listing standard for novel companies called "Natural Asset Companies," or "NACs" for short. NACs would have the overriding purpose of "maximiz[ing] ecological performance" and could not earn revenues except through activities that "replenish natural resources."[18]

Ordinarily, listing a new type of company on the NYSE is a serious business. The NYSE's manual for listed companies begins by declaring:

> A listing on the New York Stock Exchange is internationally recognized as signifying that a publicly owned corporation has achieved maturity and front-rank status in its industry—in terms of assets, earnings, and shareholder interest and acceptance. Indeed, the Exchange's listing standards are designed to assure that every domestic or non-U.S. company whose shares are admitted to trading in the Exchange's market merit that recognition.[19]

NACs merit none of that recognition. The NYSE provided no evidence that NACs even exist or would be legal corporate structures. NACs have not achieved "maturity" with investors. They are not a promising class of private startups requiring minor tweaks to help class leaders go public. They have no track record of earnings or "shareholder interest and acceptance." They have no record at all, as NACs don't exist. Rather, they are a wholly experimental concept funded by environmental NGOs. NACs are untested, unproven, and abjectly unsuited for listing on a national securities exchange. By proposing a listing standard for NACs, the NYSE made a mockery of its vaunted listing standards. And by seeking approval, the NYSE sought the SEC's endorsement of this unserious scheme.

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[18] 88 Fed. Reg. at 68,812.
[19] NYSE LISTED COMPANY MANUAL § 101.00.

Frequently, anti-growth environmental investing is presented as a different means for investors to pursue profits, clad, so to speak, in the sheep's clothing of financial gain. Not so with NACs. "[T]his wolf comes as a wolf."[20]

The NYSE all but admitted other motivations. The NYSE's goal was not to recognize companies that have "achieved maturity and front-rank status in . . . industry." Instead, the NYSE's goal was to "end[] the overconsumption of and underinvestment in nature" by "bringing natural assets into the mainstream."[21] In short, the NYSE thought elected governments are just not spending and regulating enough to protect the environment. Private investors, and the SEC, must step into the breach.

To remedy this "underinvestment" in "nature," the NYSE wanted to create a comprehensive regime that would brand NACs with its (and the SEC's) stamp of approval. NACs would have managed public and private lands and preserve "natural assets" such as forests and grasslands on these lands, giving investors "pure-play exposure to nature and climate."[22] Under the proposal," lands could be used for "sustainable operations"—but not to mine, to extract "fossil fuel," or to engage in "industrial agriculture."[23]

The NYSE could not, by fiat, make the conservation of "natural assets" financially valuable. So instead, it did what unscrupulous managers have always done: game the accounting. The NYSE would have had NACs adhere to a new accounting methodology that would "capture the value of [] non-monetized ecosystem services."[24] NACs would report metrics based on "natural capital accounting standards" developed by the United Nations. But most of these accounting metrics measure public goods, such as a piece of land's contribution to "climate stability," that accrue to the public as a whole, not to investors. Several other proposed metrics are subjective and non-falsifiable.

"Unequal weights and unequal measures are both alike an abomination to the Lord."[25] But not to the NYSE. At best, listing NACs on the NYSE would have misled investors as to the actual economic value of their investments. At worst, it would have perpetrated an unmitigated fraud upon well-meaning investors.

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[20] *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).
[21] 88 Fed. Reg. at 68,812.
[22] *Id.*
[23] Exhibit 5 at 110, SEC Release No. 3498665, 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 (Sept. 29, 2023), http://tinyurl.com/3t89yx46.
[24] *Id.*
[25] *Proverbs* 20:10 (ESV).

The NYSE and its supporters justified this untested means of private regulatory control because they think know what's good for the rest of the country, and for the world. That's a dangerous conceit. As C.S. Lewis wrote:

> Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.[26]

No doubt the consciences of NAC sponsors, managers, and auditors would have been stroked by their plans to "transition to a more sustainable, resilient, and equitable economy" and protect humanity from "threats to life on earth."[27] NACs would have made up for the inevitable cash losses with trumped-up accounting. The rule established both the motive and the opportunity for fraud. Think: Enron meets Greta Thunberg. Investors who wish to support green initiatives but make the reasonable assumption that a company listed on the NYSE must at least be a for-profit business would have been left holding the bag.

But investors would not have been the only immediate victims. NACs would be used to strip voters of control over public lands. They would be used to buy off corrupt foreign officials into keeping their lands fallow and their people poor. In exchange for valueless stock certificates, locals near rainforests would be forced out, and prevented from gathering firewood for cooking or heating, all while Wall Street investors electronically trade on the aesthetic value of lands they never visit, and boast about it.

* * *

As the legend goes, securities laws in the United States were famously first adopted to protect investors against stock promoters who were "so barefaced they would sell building lots in the blue sky."[28] With the NACs rule, the NYSE managed to outdo the metaphor, proposing to list the securities of companies who claim rights to the blue sky itself. Congress gave the SEC its role of reviewing stock exchange rules precisely to prevent reckless and poorly thought-through rules such as this one.

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[26] C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY 292 (Walter Hooper ed., 1948).
[27] 88 Fed. Reg. at 68,812.
[28] JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 44 (1982).

No statutory purpose would have been advanced by the NYSE's proposal, and several would have been significantly hindered by it.

II. Summary of Comments

The NACs rule was an abject failure. The rule was afflicted with fatal errors and problems at every turn.

First, the NACs rule was simply not ready for primetime, if it ever could have been. The NYSE provided no evidence of NACs' private market viability or of a single NAC even existing. That left the NYSE's estimates of investor demand pure conjecture, based on abstract claims of demand for "sustainability"-themed investments that are, in reality, already declining. Even more strangely, as described by the NYSE, NACs had no hope of making money for investors. The NYSE may have wanted "progress on ESG issues," but even investments that "do good" must also "do well" by having some financial performance.

Second, compounding the issue that no NAC evidently exists, it wasn't clear that NACs could ever exist. The NYSE seemed ignorant of basic principles of corporate and property law, which fail to recognize and are even in outright conflict with NACs' fundamental design.

Corporate law has evolved to allow some flexibility beyond Milton Friedman's maxim that a corporation's responsibility is to make profit for its shareholders. But no apparent state corporate law allows companies to wholly subordinate pecuniary motivations to collateral goals like environmental health and land management. Nor do foreign jurisdictions clearly authorize it. That's what governments and charities are for. Surely the intent wasn't to propose listing nonprofits on the NYSE. But that's ultimately what NACs are.

Not just the corporate form, but even NACs' corporate assets were seemingly created out of whole cloth. "Ecological performance rights" simply appear in the NYSE's notice but have no prior existence in property law. Financial instruments may be "infinitely customiz[able],"[29] but not the land. These rights are not enforceable. NACs' main assets wouldn't have been worth the (recycled) paper they're printed on.

Third, NACs would have used a false and misleading "natural capital" financial reporting scheme. NACs would have reported as financially valuable natural properties that are (or even that are not) within their control. NACs would have claimed the market value of things that cannot be valued, and which they could

[29] Jason Fernando, *Derivatives: Types, Considerations, and Pros and Cons*, INVESTOPEDIA (July 24, 2023), http://tinyurl.com/mv5vr3yy.

not sell. Worse, NACs were to report these "financial" figures at the same time and in the same manner as SEC filings, giving investors a false impression of legitimacy. Here, the NYSE's proposal was more than unworkable, it was sinister.

Finally, the NACs rule barely tried to be consistent with any purpose of the Exchange Act. By the NYSE's own admission, the primary purpose of listing NACs was to reduce climate change and other environmental harms. The Exchange Act says nothing about these goals. Further, the NYSE affirmatively attempted to have the SEC circumvent the Exchange Act. The Exchange Act does not authorize the SEC to regulate internal state corporate law. Yet the NYSE proposed an end-run around this limit by creating corporations that state corporate law prohibits.

III. Background

The NYSE proposed a new listing standard for NACs. NACs are "a new concept"[30] created by the Intrinsic Exchange Group Inc., a private company. The standard would have added a new subsection to section 102 of the NYSE's Listed Company Manual and made conforming amendments to subsections 202.06, 303A.07, and 802.01E. The standard defined NACs and established conditions for their listing on the NYSE.

Definition of NACs

According to the listing rule, 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."[31] NACs may "conduct revenue-generating sustainable operations" that are consistent with this primary purpose and "engage in other activities that support community well-being," but only so long as those activities are "sustainable."

NACs would have operated by obtaining "a license that grants it ecological performance rights" from public or private landowners.[32] Ecological performance rights are "rights to the value of natural assets and the production of ecosystem services" in the geographic area covered by the license.[33] "Ecosystem services" mean "direct and indirect contributions from nature to economies and people's wellbeing" like "climate stability" and "clean air."[34]

Listing Requirements

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[30] 88 Fed. Reg. at 68,812.
[31] Ex. 5, *supra* note 23, at 109.
[32] 88 Fed. Reg. at 68,812.
[33] Ex. 5, *supra* note 23, at 109.
[34] *Id.*

To have been eligible to list on the NYSE, a NAC would have needed to meet certain quantitative financial requirements, adopt prescribed provisions in its corporate charter, adopt certain social policies, adopt an "Equitable Benefit Sharing Policy," and publish periodic ecological performance and technical reports.

A NAC would first have needed to meet the NYSE's initial quantitative requirements for listing equities.[35] These include requirements that a company meet minimum share distribution volume criteria,[36] aggregate market value thresholds,[37] and earnings or market capitalization tests.[38] Once listed, a NAC would have also been subject to the NYSE's continuing listing requirements.[39]

Next, a NAC would have needed to adopt five prescribed provisions in its corporate charter. First, a NAC's charter would state that the "primary purpose of the company is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services, with the objective of maximizing ecological performance."[40] Second, the company would "seek to conduct sustainable revenue-generating operations" only when "doing so is consistent with the company's primary purpose," and the rule provided several requirements for determining whether such operations are "sustainable."[41] Third, a NAC could engage in other activities that "support community well-being."[42] Fourth, all NAC funds, including any proceeds from its Initial Public Offering (IPO), would be "used primarily to meet the NAC's operational needs to fulfill its purpose," but also could be "used to support community well-being."[43] Finally, a NAC would be prohibited from "engaging directly or indirectly in unsustainable activities."[44]

A NAC would have also adopted and disclosed certain company social policies. These would include an "Environmental and Social Policy" that articulates "objectives and principles . . . to achieve sound environmental and social performance," a "Biodiversity Policy" that would commit the company to "achieving

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[35] *Id.*
[36] NYSE LISTED COMPANY MANUAL § 102.01(A) (requiring 400 holders of 100 or more shares, among alternatives).
[37] *Id.* § 102.01(B) (requiring an aggregate market value of $40 million for companies that list via IPO).
[38] *Id.* § 102.01(C)(I) (requiring adjusted earnings of at least $10 million in the aggregate over 3 years, among alternatives); *id.* § 102.01(C)(II) (requiring global market capitalization of $200 million, among alternatives).
[39] Ex. 5, *supra* note 23, at 113.
[40] *Id.* at 110.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*

no net loss" of biodiversity, and a "Human Rights Policy" that was "consistent with the United Nations Guiding Principles on Business and Human Rights."[45]

Next, a NAC would have adopted an "Equitable Benefit Sharing Policy." The Policy would "articulate[] the NAC's commitment to sharing benefits with Local Communities."[46] "Local Communities" were defined as "groups of people—including indigenous peoples and other local groups—who have direct ties and derive livelihood or cultural values from the area to which a NAC holds a license."[47] Under the Equitable Benefit Sharing Policy, upon closing an IPO a NAC would distribute shares of its common stock to these so-defined local communities.[48] If the NAC had entered into a license agreement for public lands, it would distribute at least 50 percent of its outstanding shares to these communities.[49] If a NAC owned the land or entered into a license agreement for private lands, the distribution requirement would be 5 percent.[50] The distribution of shares would be facilitated by a bank at the time of the IPO.

Reporting requirements

NACs would have been subject to several reporting requirements in addition to filing GAAP financial statements. Prior to and after listing, NACs would periodically publish Ecological Performance Reports providing investors with statistical information on the ecological performance of a NAC.[51] To prepare such reports, NACs would also conduct an annual Technical Ecological Performance Study, which would provide underlying information for the ecological performance report.[52] Both the reports and the studies would be examined and attested to by a public accounting firm registered with the Public Company Accounting Oversight Board and that was independent from the NAC under the independence standard established by Regulation S-X.[53]

NACs' ecological performance reports and technical studies would adhere to an accounting framework created by IEG based on the United Nations' System of Environmental-Economic Accounting—Ecosystem Accounting.[54] The IEG framework directs NACs to "assign economic value" to natural production and natural asset

[45] *Id.*
[46] *Id.* at 111.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 112.
[51] *Id.* at 112–113.
[52] *Id.*
[53] *Id.*
[54] 88 Fed. Reg. at 68,813.

metrics.[55] NACs' ecological performance reports would compile these metrics and report a "Total Economic Value" of its natural assets.[56] NACs' reports would cover the same fiscal periods as traditional financial statements.[57]

A NAC would also publish, at least annually, a report on its Equitable Benefit Sharing Policy providing a detailed description of its activities under the policy.[58] This report too would be examined by a PCAOB-registered public accounting firm and would be accompanied by an examination level report attesting to the NAC's compliance with the policy.[59]

SEC Proceedings

To approve an exchange rule, the SEC must find that the "proposed rule change is consistent with the requirements of [the Exchange Act] . . . that are applicable to" the exchange.[60] To be consistent with the Exchange Act, an exchange rule must be:

> [D]esigned to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange.[61]

The NYSE's rules also must not "impose any burden on competition not necessary or appropriate" to advance these purposes.[62] Because the SEC reviews

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[55] Exhibit 3 at 84, SEC Release No. 3498665, 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 (Sept. 29, 2023), http://tinyurl.com/yd92msnk.
[56] *Id.* at 62.
[57] Ex. 5, *supra* note 23, at 112.
[58] *Id.*
[59] *Id.*
[60] 15 U.S.C. §§ 78s(b)(2)(C)(i), 78f.
[61] 15 U.S.C. § 78f(b)(5).
[62] *Id.* § 78f(b)(8).

whether the rule is in "the public interest,"[63] the SEC must also consider "whether the action will promote efficiency, competition, and capital formation."[64]

The SEC's findings supporting the rule must be "supported by substantial evidence,"[65] and the agency must engage in the "reasoned analysis" required by the Administrative Procedure Act.[66] The substantial evidence standard requires "(1) that the agency's decision be based upon the entire record, taking into account whatever in the record detracts from the weight of the agency's decision; and (2) that the agency's decision be what a reasonable mind might accept as adequate to support [its] conclusion."[67] Although this standard requires "something less than the weight of the evidence," it is "more rigorous than the arbitrary and capricious standard normally applied to informal rulemaking."[68] The test "imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate."[69] Under this standard of review, courts of appeal have not hesitated to reverse the SEC when it has relied on at best "mixed" observational studies to formulate corporate governance rules.[70]

Because the NYSE is a private organization, not an executive agency charged with administering the Exchange Act, no deference is owed either to its findings of fact or its interpretations of the law, and no presumption of regularity attaches to its actions. To the extent any deference is owed under the statute, it would be to the SEC's findings and legal conclusions in an approval or disapproval order. If an SEC order approving or disapproving the NYSE's decision fails to comply with the reasoned decision-making requirements of the Administrative Procedure Act, courts must reverse the order.

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[63] *See* 15 U.S.C. § 78f(b)(8) (using the phrase "necessary and appropriate in furtherance of the purposes of this title," which includes "the public interest").
[64] 15 U.S.C. § 77b(b).
[65] 15 U.S.C. § 78y(a)(4).
[66] *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 445 (D.C. Cir. 2017) ("We review the Order under the Administrative Procedure Act").
[67] *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1213 (5th Cir. 1991) (internal quotation marks omitted).
[68] *Id.* at 1213–14.
[69] *Id.* at 1214.
[70] *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011) ("In view of the admittedly (and at best) 'mixed' empirical evidence, we think the Commission has not sufficiently supported its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value.").

IV. Comment

A. NACs Are An Unproven Concept Unsuited for Listing on a National Securities Exchange.

NACs have no private market record to prove viability before going public. As a result, there is no actual investor demand for NACs. But even the NYSE's theoretical case supporting demand for NACs was unfounded. Demand for sustainability driven investments is falling, and it's not clear that what demand exists would have been served by NACs. Regardless, NACs likely couldn't have served any *investor* demand because NACs were not set up to make money. Investors, even those motivated by sustainability, need at least some financial return. The NYSE provided no evidence that NACs could provide that and significant evidence that they couldn't.

1. NACs have undergone no market testing and have no track record of success.

Ordinarily, a company lists on a public stock market after it has demonstrated its viability in private capital markets. The SEC has described how a company's listing on a public stock market provides an "exit event" for private business owners after the business "reaches a size, scale, and sophistication that would make it attractive to public market investors."[71]

With the NACs rule, the NYSE put the cart before the horse. NACs have no private market record. There was no record of any NAC existing, and the NYSE provided no evidence of one. The NYSE even admitted that NACs were a "new concept" and implied that they don't yet exist, stating that "NACs *will be* corporations" when it defined NACs in its notice filing.[72]

As the NYSE reported, NACs are a new concept developed by IEG. IEG is a private corporation that lists among its investors and supporters the Rockefeller Foundation, The Nature Conservancy, and the Inter-American Development Bank, a bank funded and sponsored by U.S. and Latin American governments.[73]

The only potentially related example available is not a NAC, but a "pilot project" IEG announced in 2021 with the Inter-American Development Bank and the government of Costa Rica that reportedly aimed to "lay the foundation for NACs."[74]

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[71] *How Do Startups "Exit" or Provide Liquidity to Investors?*, SEC (July 12, 2023), http://tinyurl.com/yeyk2pzj.
[72] 88 Fed. Reg. at 68,812.
[73] *Team*, INTRINSIC EXCH. GRP., http://tinyurl.com/5n7k62pt (last visited Jan. 12, 2024).
[74] Press Release, NYSE and Intrinsic Exchange Group announce a new asset class to power a sustainable future, INTER-AM. DEV. BANK (Sept. 14, 2021), http://tinyurl.com/3e8fy2bb.

Neither the NYSE nor IEG have since reported the status of the project, whether it led to the formation of any NACs, and if so, whether any NACs formed were successful. The same 2021 release that announced the Costa Rica pilot project also reported that IEG "anticipates announcing its first partnership later this fall in collaboration with a multinational corporation."[75] IEG apparently never made any such announcement.

This was sparse material to work with. There was simply no record evidence, let alone substantial evidence, that NACs were viable entities in any market. They were not ready for primetime.

2. NACs lack demonstrated investor demand.

Companies that list on public stock exchanges usually do so because there is adequate evidence to suggest they are "attractive to public market investors."[76]

The NYSE claimed that NACs would meet investors' "unmet need for efficient, pure-play exposure to nature and climate."[77] As the NYSE told the story, investors "recogniz[e] the urgency and opportunity" presented by environmental degradation and "increasingly express a desire for investment vehicles that will permit them to express a sustainability thesis."[78] To meet that desire, investors have used "[i]mprovements in corporate disclosures" about sustainability, such as ESG and sustainability reporting, "climate an nature-focused indices," and "the development of ESG funds" to invest.[79] Yet the NYSE claimed "unmet need" "[d]espite these advances."[80]

None of this made out any evidence of investor demand for NACs. Investor demand for "sustainability" investment vehicles is not increasing but collapsing. What demand still exists is already adequately met by the market. And if there were unmet demand, the NYSE gave no evidence that NACs would have met it.

To begin, the NYSE relied on a false premise. Investors do not "increasingly express" desire for sustainability investments. To the contrary, assets in sustainability vehicles are declining rapidly. According to Morningstar, more ESG funds closed in 2023 than in the prior three years combined.[81] As of July 2023,

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[75] *Id.*
[76] SEC, *supra* note 71.
[77] 88 Fed. Reg. at 68,812.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *See* Silla Brush, *BlackRock, State Street Among Money Managers Closing ESG Funds*, BLOOMBERG (Sept. 21, 2023), http://tinyurl.com/2u4338jd.

investors had pulled more money out of ESG funds than they put into them.[82] The Big Three asset managers, BlackRock, State Street, and Vanguard, who were responsible for much of the initial demand for sustainability investing, are reportedly "abandoning" sustainable funds amidst collapsing demand in the market.[83]

For its support, the NYSE cited a 2020 Global Sustainable Investment Alliance report that claimed global sustainable investment assets had grown from $30.7 trillion in 2018 to $35.3 trillion in 2020.[84] But the NYSE failed to disclose that the group's more recent 2022 report showed global sustainable assets had fallen to $30.3 trillion.[85]

Next, there is no unmet investor demand for "pure-play exposure to nature and climate," as the NYSE put it. Declining demand for sustainable investment products suggests that the market is already oversaturated. The only evidence the NYSE presented—documenting "advances" in investors' ability to invest in sustainability-friendly vehicles[86]—weighed against the NYSE, showing that the market was already meeting investor demand. The NYSE provided no evidence of unmet demand.

Finally, even if there were unmet demand for an "efficient, pure-play exposure to nature and climate," NACs would not have met that demand because they were not "efficient." In the investment context, efficiency is judged by financial returns.[87] NACs would not have been required to generate revenue at all and would have had immense monitoring costs, as discussed in Part IV.B.3, *infra*. They were not financially efficient. Moreover, the byzantine system of land use regulation that NACs entailed did not follow from the NYSE's premise that the rule would have merely ensured "consisten[cy] . . . with the ecological and socially equitable goals that would motivate investors when investing in the NAC."[88] The NYSE presented no evidence that environmentally and socially minded investors desired *this* system of

[82] *Id.*
[83] *Id.*
[84] 88 Fed. Reg. at 68,812 n.5; GLOB. SUSTAINABLE INV. ALL., GLOBAL SUSTAINABLE INVESTMENT REVIEW 2020, at 9 (2020), http://tinyurl.com/3b9wkmx5.
[85] GLOB. SUSTAINABLE INV. ALL., GLOBAL SUSTAINABLE INVESTMENT REVIEW 2022, at 10, http://tinyurl.com/3c3xa8tk. The GSIA attributes the decline to a change in its methodology for U.S. assets to report sustainable assets more accurately. For the 2022 report, the GSIA no longer included assets that claimed "ESG integration" but did not have specific "ESG criteria." The NYSE did not provide the change or its assessment of how the more accurate methodology affected projection of demand for sustainability-themed investments.
[86] 88 Fed. Reg. at 68,812.
[87] Caroline Banton, *What Is a Measure of Efficiency in an Investment?* INVESTOPEDIA, http://tinyurl.com/5n8cxsce ("An investment's measure of efficiency is its return on investment.").
[88] 88 Fed. Reg. at 68,818.

land use regulation, or the NACs' narrow, anti-growth concept of what counts as "sustainable."

3. NACs' operating and monitoring costs would have exceeded any financial value to investors.

The NYSE stated that the rule would protect investors because it would have subjected NACs to "rigorous quantitative financial requirements" and otherwise benefited investors.[89] But the rule's proposed structure and limits on NACs all but guaranteed that their costs would have exceeded any financial benefits they could have generated for investors.

NACs would have been hard-pressed to earn income that could be distributed to investors. A NAC had vanishingly few ways in which it could earn income, none of which were promising. Second, whatever income NACs could have managed to generate would have inevitably been wiped out by their immense monitoring costs. Finally, on top of all of that, even if a NAC found itself with free cash flow, its bizarre corporate governance provisions would have prevented it from being distributed to investors in the ordinary course.

First, it's unclear how a NAC could have made money and satisfied the rule. A NAC could undertake "revenue-generating operations" only "[w]here doing so is consistent with" its "primary purpose": maximizing ecological performance.[90] Not only that, revenue-generating operations would have to be "sustainable." They would need to affirmatively "seek to replenish the natural resources being used" and "not cause any material adverse impact on the condition of the natural assets under a NAC's control." Moreover, even if revenue-generating operations advanced the NAC's primary purpose and were sustainable, they could not, as a whole, cause a net loss in biodiversity.[91] And no matter what, revenue-generating operations could not include "fossil fuel development, mining, unsustainable logging, or perpetuating industrial agriculture" or anything else that "directly or indirectly" engaged in "unsustainable activities."[92] Sustainability would have been judged by metrics that aim to punish nearly all productive uses of land as a loss in asset values.

It is difficult to imagine how a NAC *could* earn income. The NYSE suggested that examples could have included "eco-tourism" or the "production of regenerative crops."[93] But the NYSE nowhere explained how these activities would satisfy NACs' requirements.

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[89] 88 Fed. Reg. at 68,817.
[90] Ex. 5, *supra* note 23, at 110.
[91] *Id.* at 111.
[92] *Id.* at 110.
[93] 88 Fed. Reg. at 68,812.

Consider the uncertainty investors would have been plunged into if a NAC's only viable revenue source was tourism. Tourism decreases biodiversity by making prey more vulnerable to predators, as they "habituate" to interactions with humans.[94] Tourism is also "a major pathway for the introduction and spread of invasive species."[95] Would allowing eco-tourism violate a NAC's policy to "achiev[e] no net loss" to biodiversity? Tourism also "puts enormous stress on local land use, and can lead to soil erosion, increased pollution, [and] natural habitat loss" that "gradually destroy [] environmental resources."[96] Merely slapping the modifier "eco" on the word tourism would not have satisfied a NAC's obligation to increase an environment's "production of ecosystem services."[97]

Even if a NAC could regulate tourism so extensively so as to mitigate all of these impacts (while still attracting enough tourists to generate material revenue), allowing tourism would still harm the environment in other ways. Anyone wealthy enough to pay for eco-tourism in Costa Rica or the Amazon rainforest will fly there. Flying to remote rainforests will likely require multiple flights to reach the destination, often including private jets or helicopters. Tourism accounts for 5 percent of *total* global greenhouse gas emissions and 22 percent of global transport emissions, but eco-tourism to distant rainforests for the wealthy would be particularly carbon-intensive.[98] A NAC promoting eco-tourism would be "indirectly" contributing to climate change, which the NYSE declared is a "threat[] to life on earth."[99] The NAC would not, however, be required to account for these travel emissions. Jetsetters don't have to play by the climate accounting rules.

It's even more unclear when tourism could ever help "maximize" ecological performance, as the rule appeared to require. Tourism is inherently consumptive of natural resources unless the tourists can somehow provide an environment with a source of organic growth. The novel "Jurassic Park" infamously involved another pilot "natural asset company" located in Costa Rica, but one can assume using tourists as a feedstock is not what the NYSE had in mind here.[100]

Second, whatever income NACs could have managed to generate would have inevitably been wiped out by their immense monitoring costs. Under the

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[94] Anissa Putois, *The Downside of Ecotourism: What Happens When Humans Interact With Animals*, ONE GREEN PLANET, http://tinyurl.com/mrx8w2a2 (last visited Feb. 2, 2023).
[95] *Tourism and Invasive Species*, INVASIVE SPECIES COUNCIL OF B.C. (2021), http://tinyurl.com/4swytmrs.
[96] *Negative Environmental Effects of Tourism*, WORLDCOUNTS, http://tinyurl.com/3xhe7ryk.
[97] Ex. 5, *supra* note 23, at 109.
[98] Dave Keating, *Overtourism is Harming the Climate. What Can be Done About It?*, ENERGY MONITOR (May 19, 2023), http://tinyurl.com/t43466sw.
[99] 88 Fed. Reg. at 68,812.
[100] MICHAEL CHRICHTON, JURASSIC PARK (1990).

rule, NACs' overhead compliance costs would be steep. In addition to imposing myriad restrictions on NACs' revenue-generating activities, the "sustainability" requirement applies to all NAC operations, including supporting community well-being. NACs must also adopt and operate compliance policies on other subjects too, including "Human Rights," "Social Policy," and "Equitable Benefit Sharing." The resources needed to develop these programs and operate them to ensure the NAC's compliance would be extensive.

On top of that, NACs would have greater reporting obligations than other listed companies. In addition to the Exchange's existing requirements and reporting of GAAP financial information, NACs would need to annually produce periodic Ecological Performance reports based upon technical studies examined and attested to by independent PCAOB-registered accounting firms. NACs would also need to publish annual Equitable Benefit Sharing reports examined by an independent examiner (who produces a reasonable assurance examination report) under PCAOB standards. Listed companies do not face these requirements. Listed companies may choose to produce ESG or sustainability reports, but they are not required.

Any serious attempt at verifying the "ecological performance" of a NAC would require far more than consulting a firm's books and records. It would require deploying teams of land surveyors, biologists, ecologists, and economists to remote parts of the world, adding more emissions from transportation in the process.

The NYSE gave these costs no thought at all, which was arbitrary and capricious. With little ability to earn revenue and steep overhead costs to contend with, NACs were doomed to failure.

Finally, even if a NAC was able to generate free cash flow, it was unclear how a NAC could return capital to investors. NACs' strange corporate governance provisions would have alone diminished returns.

Elementary corporate finance instructs that a company should return capital to investors (via dividends, share repurchases, etc.) once the firm has exhausted investment opportunities that would generate returns in excess of the firm's cost of capital.[101] Investing company funds in projects that earn less than the cost of capital is value destructive. If a company has no available investment opportunities that would clear the hurdle rate, then the efficient outcome would be to return free cash flow to its investors.

NACs violated this basic tenet of corporate finance. By a charter-provision mandate, NAC funds "must be used primarily to meet the NAC's operational needs

[101] *Hurdle Rate*, CORP. FIN. INST., http://tinyurl.com/4fhdre3u.

to fulfill its purpose."[102] Whatever "primarily" meant (how much of the NAC's funds? A majority?), this provision prohibited NACs from returning free cash flow to investors when the cash could be used for projects that advance a NACs purpose, even if those projects are value destructive.

It gets worse. A NAC's charter not only put value-destructive investments upstream of investors in line for funds, it opened up additional outlets for the company to divert funds before ever reaching investors. By another charter mandate, NAC funds could be "used to support community well-being."[103] The rule's definition of "community well-being" put NAC management in the throne of the philosopher-king: "the combination of social, economic, environmental, cultural and political conditions of individuals and their communities as essential for them to flourish and fulfil [sic] their potential."[104] A motivated manager could muster almost any reason to justify his belief that something is in the subjective well-being of the people. As the D.C. Circuit has observed, such vague and subjective language as "decent, upright, good, or right" "affords an almost boundless area for individual assessment of the morality of another's behavior."[105] This provision constituted a blank check that offered investors no assurance that they would have ever seen their money back.

NACs offered investors no plausible financial benefit that could have outweighed their immense costs. Listing NACs would not have provided a new "option" for investors comparable to other securities, but a money pit. And because NACs face such financial long odds, NACs would have faced all the more pressure to paper over their struggles with credulous valuations of their natural assets.[106]

B. NACs Have No Apparent Legal Basis in Private Law.

Not only did NACs apparently not exist, it's not clear that they could ever exist. Fundamental features of NACs' design contradicted background corporate and property law. NACs' novel primacy for "ecological performance" was in conflict with all known corporate law, which even at its most liberal requires that corporations balance nonshareholder interests with shareholder pecuniary interests. NACs' principal assets, "ecological performance rights" are not known in property law and would have been unenforceable. Even if the NACs rule were adopted, there would have been no NAC entities to list.

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[102] Ex.5, *supra* note 23, at 110.
[103] *Id.*
[104] 88 Fed. Reg. at 68,813.
[105] *Ricks v. District of Columbia*, 414 F.2d 1097, 1106 (D.C. Cir. 1968) (cleaned up).
[106] *See infra* Part IV.C.1.

1. NACs are not legal under U.S. state corporation law.

The NYSE's description of NACs envisioned a novel corporate entity that is wholly unknown to state law. In its "Required Charter Provisions" section, the listing standard stipulated that a NAC must have a "primary purpose" that "maximiz[es] ecological performance" and subordinates "revenue-generating operations" to that purpose and other duties to the preserve the natural environment.

These requirements openly flouted existing state corporate law. NACs apparently sought to invert the longstanding background legal principle that corporations are managed subject to fiduciary duties to increase the economic value for its shareholders, expressed by Milton Friedman's famous maxim that the "social responsibility of business is to increase its profits."[107]

That was a problem because, at least as described by the NYSE, a NAC is not a charitable organization, but a corporation. Because NACs cannot satisfy the basic requirements that the corporate form imposes, they are legally invalid. A NAC could not enforce contracts or issue shares—let alone list on the NYSE.

Moniker notwithstanding, a NAC is not a "natural" person. To operate as a going business concern, a NAC therefore must have some other source of legal personhood. The NYSE said that a NAC would exist as "a corporation."[108] As the Supreme Court has explained, "[c]orporations are creatures of state law"[109] that "can have no existence" outside of state law.[110] But across U.S. states, the corporate form imposes duties that NACs cannot comply with.

Under applicable state law, the corporate form is reserved to for-profit enterprises. In Delaware, the leading state for corporation law (and the state in which IEG is incorporated), the corporate form is "accompan[ied]" by fiduciary duties that require corporate directors to "promote the value of the corporation for the benefit of its stockholders."[111] These duties require directors to "seek stockholder welfare as the only end" of corporate activity.[112] Under Delaware law, a court may not "accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders."[113] Other states have similarly provided that "a business corporation

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[107] Milton Friedman, *A Friedman Doctrine– The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), http://tinyurl.com/384k24j3.
[108] 88 Fed. Reg. at 68,811.
[109] *Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1977).
[110] *Bank of Augusta v. Earle*, 38 U.S. 519, 520 (1839).
[111] *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).
[112] *Cumming ex. rel. New Senior Inv. Grp., Inc. v. Edens*, C.A. No. 13007, 2018 WL 992877 (Del. Ch. 2018).
[113] *eBay*, 16 A.3d at 34.

is organized and carried on primarily for the profit of the stockholders" and may not choose to "reduc[e] profits . . . in order to devote them to other purposes."[114]

To be sure, some states, including Delaware, have recently enacted alternative corporation statutes that allow socially minded businesses to incorporate as "public benefit" corporations.[115] But this alternative does not eliminate the requirement that a corporation must be managed with at least some degree of profit motive. In Delaware's version of the statute, "[a] public benefit corporation is a *for-profit* corporation" that must "balance" achieving its intended public benefits with advancing "stockholders' pecuniary interests."[116] No state allows a public benefit corporation to subordinate financial interests entirely to other goals, as the NACs rule would have required.

Other states have adopted so-called "constituency" statutes that permit corporate directors to consider other factors, such as "community and societal considerations," in exercising their fiduciary duties.[117] These considerations usually apply in the context of corporate takeovers, when selling the company to an outside buyer might affect jobs and other discrete community interests. They do not ordinarily allow companies to operate primarily for the interest of one constituency.[118] Accordingly, most constituency statutes only *permit* rather than require the consideration of nonshareholder interests.[119] No constituency statute eliminates corporate directors' underlying duty to advance shareholders' "best interests," which remains financial in nature.[120]

In sum, state law imposes an irreducible minimum that business corporations operate for profit. As the Delaware Court of Chancery put it: "The corporate form . . . is not an appropriate vehicle for purely philanthropic ends."[121] For socially-minded philanthropic ends, there is another option. Every U.S. state has adopted a statute that permits charitable corporations. Organizations that seek to advance a "public purpose" and subordinate revenue they earn to that purpose can incorporate as charitable corporations. But they cannot incorporate as business corporations, which must be for-profit.

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[114] *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).
[115] *See, e.g.*, DEL. CODE tit. 8 § 362.
[116] *Id.* (emphasis added).
[117] *E.g.*, MINN. STAT. 302A.251., 15 PA. CONS. STAT. §516(a); VT. STAT. tit. 11A, § 8.30(a)(3), WYO. STAT. § 17-16-830(e)(i)–(v).
[118] *See CTS v. Dynamics Corp. of America*, 481 U.S. 69 (1987).
[119] Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 Pepp. L. Rev. 971, 987 (1992).
[120] *See Baron v. Strawbridge & Clothier*, 646 F. Supp. 690 (E.D. Pa. 1986).
[121] *eBay*, 16 A.3d at 34.

NACs could not satisfy this for-profit requirement. The listing standard would have required that a NAC be governed by a corporate charter that mandates a "primary purpose" of "maximizing ecological performance" and allows for "sustainable revenue-generating operations" only "[w]here doing so is consistent with" that purpose.[122] Such "sustainable" revenue-generating operations would be subject to other conditions too, including that they "replenish natural resources" and do not degrade the environment. NACs must "maximiz[e]" ecological performance to the exclusion of economic value wherever those goals conflict, and even if they do not conflict.[123] Any chance for a NAC to earn revenue (let alone profit) must be subordinate to these other purposes.

In other words, a NAC's charter would itself be "a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value" of the corporation or its shareholders.[124]

These charter provisions are not valid under state corporation law. They do not make "stockholder welfare . . . the only end" of the corporation. Nor do they "balance" ecological performance goals with "stockholder pecuniary interests," as would be required of a public benefit corporation. Nor do they "consider" the benefits of ecological performance as one constituency in the context of an underlying duty to advance shareholders' "best interests," as would be required under a constituency corporation statute. For NACs, "maximizing ecological performance" overrode all other considerations.

NACs' failure to attempt even basic compliance with state corporation law meant the listing standard was dead on arrival. As defined in the proposed listing rule, NACs could have no legal personhood in U.S. states. Their charters would be invalid. As the Delaware Court of Chancery has stated, "Delaware law does not charter law breakers."[125] As a matter of law, there would have been no NAC "corporation" for the NYSE to list. Any shares that NACs issued could have been rescinded by investors.

That doesn't mean that all organizations formed to advance environmental purposes are illegal. A NAC could likely incorporate as a charity. If, by saying "a NAC is a corporation," the NYSE meant a *charitable* corporation, then the listing standard should have said so. But if NACs are nonprofits, that would only further confirm they are designed to regulate land use or advance other eleemosynary purposes, not

[122] *See* Part III, *supra*.
[123] *Id.*
[124] *eBay*, 16 A.3d at 34.
[125] *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011).

securities in which an investor must have a reasonable expectation of "profit," as discussed in Part IV.D below.

U.S. state law provides no basis for the incorporation of NACs as business corporations. The only possible alternative would be in foreign jurisdictions. As the next section discusses, that provides no satisfactory option either.

2. NYSE provided no evidence that NACs can be organized under the laws of any foreign jurisdiction.

Though the NYSE never said so outright, NACs could have apparently been foreign companies. The listing standard would have been placed in the listed company manual as a subsection of the section titled "Domestic Companies,"[126] and the NYSE's notice of the proposed rule change did not describe the possibility of foreign NACs. However, the listing standard itself stated that NACs would have been subject to all "continued" (as opposed to initial) existing listing requirements under listed company manual section 103, labeled "Foreign Private Issuers," as well as those for domestic companies.[127] And the standard elsewhere referenced NACs that would file SEC Form 20-F, the document required for foreign private issuers.[128] This implied that NACs could have been foreign companies.

It is not readily apparent that foreign corporate laws would allow for NACs. The NYSE supplied no evidence that they would. Like U.S. states, many foreign jurisdictions require that business corporations be managed in shareholders' economic interests. Some foreign jurisdictions allow for a more lenient standard of care that permits greater consideration of stakeholder interests. Others require greater disclosures by companies of their environmental impact. But apparently no country covered by recent reports on the subject has enacted a law that allows companies to entirely disclaim the baseline duty that corporations must seek to earn profit for shareholders.

In Europe, the United Kingdom requires that a company be "primarily accountable to its shareholders."[129] France's corporate code states that a company's objectives are for "benefit[] or profit" and must "consider the interest of the company as an economic, human and financial entity."[130] Although Germany requires worker

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[126] NYSE LISTED COMPANY MANUAL § 102.00.
[127] Ex. 5, *supra* note 23, at 113. The listing standard text also reproduced, without amending, the first sentence of listed company manual section 103: "The Exchange welcomes listing inquiries from foreign private issuers."
[128] *Id*. at 117.
[129] *International Comparison of Selected Corporate Governance Guidelines and Codes of Best Practice* at 85, WEIL, GOTSHAL & MANGES (June 2014), http://tinyurl.com/s6nx5hhv.
[130] Memorandum from Florence Richard & Marie Vogt, Kersus Société D'Avocats, to Prof. Robert Eccles/UN Global Compact, (May 21, 2015),http://tinyurl.com/jk7dvxkf.

representation at some companies, fiduciary duties are "primarily owed to the company itself (and not to 'a social role' of the company)."[131] In Spain, "the primary duty is increasing the company's economic value, i.e., maximizing the investments of the shareholder[s]."[132]

Next, "most Latin American countries require corporate directors to act in the best interest of the corporation," which "has generally been interpreted as a mandate to act in the best interest of the shareholders as a whole."[133] Argentina's code states that commercial and civil corporations have "primarily a 'profit purpose.'"[134] Chile requires that corporations exercise their powers "in favor [of] the company and of all shareholders.[135] Under Colombian law, the corporation "has obligations only to its shareholders and its primary duty is to its shareholders over all other stakeholders."[136] Mexico provides similarly.[137] Brazil's law is more lenient because directors' duties are "owed to the company itself (and not necessarily to its shareholders)," but still implies at least some financial focus by contrasting directors' duty to balance "the company's best interests" against the "social role of the company."[138]

The most notable exception to the shareholder-value norm in Latin America is Cuba, which requires that foreign investors obtain "the approval of a public agency assessing the environmental impact of the business."[139] Maybe that is where the NYSE intended NACs to incorporate.

In Asia, Japan notably allows for corporate directors to consider the interests of employees in exercising their fiduciary duties, but "aiming [at] profit is one of the essential element[s] of a company."[140] However, in China, while directors owe "duties

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[131] Memorandum from Dr. Birgit Spiesshofer et al., Dentons PLLC, to Prof. Robert Eccles/UN Global Compact (Dec. 18, 2014), http://tinyurl.com/2hbfrvr8.
[132] Letter from J&A Garrigues, S.L.P. to Prof. Robert G. Eccles, Harvard Bus. Sch. (Aug. 28, 2015), http://tinyurl.com/4tppm5ht.
[133] Aurelio Gurrea-Martinez, *Sustainability and Corporate Governance in Latin America*, EUR. CORP. GOVERNANCE INST. (May 10, 2022), http://tinyurl.com/3m4hurzr.
[134] Memorandum from Victoria Vasalo & María de la Paz Miatello, PAGBAM, to Prof. Robert Eccles, Harvard Bus. Sch. (Dec. 11, 2015), http://tinyurl.com/45etxysf.
[135] Memorandum from Grupo Vial Abogados to Prof. Robert G. Eccles, Harvard Bus. Sch. (Jan. 6, 2015), http://tinyurl.com/4wpj6j3b.
[136] Felipe Pinilla, Pinilla González & Prieto Abogados, Legal Opinion of Columbia, http://tinyurl.com/crtyh8m2 (last visited Feb. 1, 2023).
[137] CCN Attorneys, Legal Opinion for Mexico (Dec. 2015), http://tinyurl.com/4mtr7ynx.
[138] Memorandum from Mattos Filho Advogados to UN Global Compact (Oct. 31, 2014), http://tinyurl.com/yfubmpcd.
[139] Aurelio Gurrea-Martinez, *supra* note 133.
[140] Memorandum from Toshikazu Sakai & Shunsuke Domon, Anderson Mori & Tomotsune, to Prof. Robert Eccles (Sept. 21, 2015), http://tinyurl.com/48vu3krm.

of loyalty and diligence to the company," "executives who are Party members are first subject to the CCP's investigation and punished according to Party disciplines," which require corporations to "achieve multiple objectives so that people in the whole country can benefit."[141] Perhaps then NACs could incorporate in China. But this is unlikely, given the CCP's interest in exploiting the mineral resources of developing countries.

Given the implausibility of incorporating under the laws of U.S. states, maybe the NYSE intended that NACs would be foreign corporations. But the NYSE provided no evidence they could do that either. The available evidence suggests they couldn't. NACs' novel corporate governance structure was a stranger both at home and abroad.

Even if NACs could have incorporated abroad, the NYSE should have said that was its intent. Otherwise, it would have been arbitrary to list NACs as "domestic companies" under the listed company manual. Moreover, if NACs were mainly foreign entities, fraud risks would have been heightened because of diminished legal protections against foreign issuers. The NYSE would have had to address that in its analysis too.

NACs were supposed to be "corporations," but they have no basis in U.S. state or foreign corporate law, and the NYSE seemed blind to this fact. But corporate law is not the only background law to which NACs were wholly unknown, as discussed next.

3. Ecological performance rights are not legal property.

The listing standard envisioned that ecological performance rights would comprise nearly all of NACs' financial value. But these are not assets at all because they are not legal property. Ecological performance rights are not property, nor can they be reduced to property because ecological services are non-exclusive public goods that accrue to the public, not to investors. As a result, NACs would have been shell entities with no assets.

The listing standard defined NACs as companies that "hold the rights to the ecological performance . . . produced by natural or working areas."[142] These rights would be "licensed from sovereign nations or private landowners" through "license agreements."[143]

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[141] Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-owned Enterprises,* 47 CORNELL INT'L L.J. 631 (2014), http://tinyurl.com/yren4a74.
[142] 88 Fed. Reg. at 68,812.
[143] *Id.* at 68,813.

These "ecological performance rights" were "rights to the value of natural assets and the production of ecosystem services in a designated area."[144] "Ecosystem services" meant "the contributions of ecosystems to benefits used in economic and other human activity," including "the direct and indirect contributions from nature to economies and people's wellbeing." Examples of such "services" included "clean air, water supply, flood protection, productive soils for agriculture, climate stability, and habitat for wildlife."[145]

No part of property law recognizes such "ecological performance rights." Property law operates by the *numerus clausus* principle, which provides that the law will "enforce as property only those interests that conform to a limited number of standard forms."[146] The basic forms include fee simple, defeasible fee simple, life estate, and lease. Lands can also include servitudes, such as an access easement or "profits"—the right to extract natural resources such as timber from the land. Ecological performance rights do not fit into any of these categories.

A license to ecological performance rights would be revocable at will and unenforceable. This has several implications for the listing standard. No entity could have qualified as a NAC because no entity can "hold the rights" to ecological performance. Nor could an entity have satisfied the rule's requirement that "any license agreement must be a minimum of ten years" in duration.[147] Since any license agreement for ecological performance rights would not be enforceable, no license agreement could have guaranteed a NAC's possession for 10 years. And even if a NAC entered into a lease as a way to acquire legal property, a lease that cannot be used for an economically valuable purpose has no value under the law of eminent domain. A government could take it back at any time.

These are not the rock on which the house is built. They are sand, liable to collapse at any time. This is what happens when the NYSE rubber-stamps clearly unvetted academic ideas for the SEC's approval.

C. The Listing Standard Was Vague and Would Have Invited Abusive Listings and Practices.

Echoing the siren song of stock promoters throughout history, the NYSE emphasized that so-called "traditional" financial reporting measures would not fully "capture the value" of NACs' "non-monetized ecosystem" assets.[148] Traditional

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[144] *Id.*
[145] *Id.*
[146] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 3 (2000).
[147] 88 Fed. Reg. 68,815.
[148] *Id.* at 68, 814.

accounting measures didn't recognize AAA subprime loans or "community-adjusted EBITDA"[149] either. As Sir John Templeton is often quoted as having said, "the four most dangerous words in investing are: This time it's different."[150]

Anticipating the problem, the SEC requested comment on whether NACs' ecological reporting requirements were "described with sufficient detail and clarity so as to provide investors with the information necessary" to distinguish between those requirements "and the NAC's GAAP financials."[151] Answer: they weren't. To the contrary, they were designed to mislead investors. First, the NYSE would have had NACs report junk "natural asset" accounting along the same methods as if it were the same as traditional SEC filings. Second, NACs' corporate governance requirements would have created conflicts of interest that invited fraud.

1. The listing standard's novel accounting method would have exposed investors to fraud and manipulative practices.

The NYSE would have required NACs to provide investors with extensive reporting about the "value" of their natural assets. The NYSE characterized these reporting requirements as "rigorous quantitative financial requirements" that would be required "[i]n addition to the GAAP financial statements" required of all companies.

Make no mistake, the purpose of these requirements had nothing to do with financial rigor. Instead, they aimed to present investors with practically side-by-side reporting of both actual company assets and "non-monetized ecosystem services," with difficult-to-distinguish monetary values attached to each. Left unsaid was the reality that "ecosystem services" will hardly be worth anything to investors.

The rule sought to compel an alternative system of accounting that falsely attributes financial value to public goods. First, the rule would have attributed company monetary value to public goods and common goods that are the property of the community, not the company. Second, it used vague and subjective accounting concepts that can be fudged at will. Third, its ecosystem-services accounting wasn't even consistent, excluding important environmental costs. Finally, the rule would have had NACs present and standardize reporting of this false accounting in a manner that is likely to mislead investors.

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[149] Matt Levine, *WeWork Accounts for Consciousness*, BLOOMBERG (Apr. 27, 2018), http://tinyurl.com/3fxxhhkt.
[150] Stephen H. Dover, *Quick Thoughts: This Time Is Different*, FRANKLIN TEMPLETON (June 18, 2020), http://tinyurl.com/yc2ymepe.
[151] SEC, *supra* note at 29–30.

i. Ecological performance rights are not assets because ecological services are public or common goods.

The entire IEG accounting framework is based on the false premise that NACs should account for the monetary value of positive externalities that are not their own property. Cost accounting works by assigning monetary value to company property based on their market prices. But companies cannot sell positive environmental externalities because they do not own them.

The NYSE explained that the rule intended to remedy the problem that "financial markets do not include the positive and negative externalities related to nature's consumption and production."[152] The goal was to "include" positive externalities by reporting their purported financial value as NACs' own. However, that cannot be accurate because positive externalities are public or common goods. The financial benefits the public derives from positive externalities cannot be "owned" by NAC.

The problem appears at the outset of the IEG accounting framework. The IEG framework bases its measurement of ecological services on the United Nations' System of Environmental-Economic Accounting—Ecosystem Accounting ("SEEA-EA"). The SEEA-EA applies national accounting principles "intended to underpin the compilation of national statistics."[153] The IEG framework thus applies accounting concepts developed for use in national accounting to individual company-level accounting. But national accounting and company accounting do not measure the same scope of outputs. National accounts measure output within the country (or countries) as a whole and may validly take into account the economic value of some positive environmental externalities to the extent their benefit is captured within the country. By contrast, company accounts measure company-level output and can rarely take into account externalities because their benefits are captured by other actors. That is why they are called externalities.

Take, for example, the "ecosystem service" category of "[r]ainfall pattern regulation services (at sub-continental scale)." [154] IEG defines this category to include the "contributions of vegetation . . . in maintaining rainfall patterns through evapotranspiration."[155] IEG explains that "[f]orests and other vegetation recycle moisture back into the atmosphere where it is available for the generation of rainfall," which contributes to "[r]ainfall in interior parts of continents."[156] For national accounting, if the "rainfall patterns" that an environment contributes to occur

[152] 88 Fed. Reg. at 68,812.
[153] Ex. 3, *supra* note 55, at 64.
[154] Ex. 3, *supra* note 55, at 72.
[155] *Id.*
[156] *Id.*

elsewhere in the same country, then that country's national accounting might validly include any economic value derived from it. But for a single company, the benefits of rainfall in a completely separate area are not likely to be captured within the company. The company could not claim the economic value of the enhanced rainfall patterns because it did not benefit from it.

IEG's accounting framework extends this logical error down every level. The three components of the framework's "Total Economic Value" are "use value" (comprised of "direct" and "indirect" values), "option value," and "non-use value" (comprised of "existence" and "bequest" values). Sources of "direct" value, defined as "[g]oods and services that can be used or consumed directly by individuals, such as food or ecotourism," at least could have market comparisons to which a NAC could trace some economic value. The rest are bunk.

"Indirect" value components include "ecosystem functioning that is indirectly beneficial to people or that is indirectly used by people, like coastal protection or climate regulation."[157] Benefits or indirect usage of company-generated externalities by other people do not translate into value for the company, now or in the future. How can they be seriously included in the company's "total economic value"? Similarly, "[o]ption value" includes the value of "having the option to use or access a natural resource or ecosystem now and in the future, even if its use is never fully realized or the benefit it provides is currently unknown."[158]

But the worst are the "non-use" values. "Existence" value, or "[t]he value of protecting the continued existence of an ecosystem . . . for the sake of its own integrity,"[159] is not verifiable by any known source. There is no market for "ecosystem integrity" for its own sake." Likewise, "[b]equest" value, or the "value of ensuring that ecosystems are available to future generations"[160] has no intrinsic value. Not only are these "values" not appropriately assigned to NACs, they are subjective, arbitrary, and likely to be abused, as discussed next.

ii. IEG's accounting methods for "ecosystem services" are subjective, arbitrary, and liable to abuse.

The IEG framework involves two essential steps. First, a NAC would measure relevant biophysical and other sources of natural production, called "ecosystem services." Second, the NAC would assign economic value to this production and the underlying natural assets. Each step is subjective and arbitrary.

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[157] *Id.* at 62.
[158] *Id.* at 60.
[159] *Id.*
[160] *Id.*

The process would begin by measuring the land and categorizing the type of ecosystem following IUCN guidance.[161] The IUCN recognizes 108 different types of ecosystems.[162] Even at this very first step, classifying each ecosystem in the land into one of these 108 groups entails significant subjective expert judgments. Further, as IEG recognizes, natural asset companies can game the system by mapping ecosystems at several different resolutions, ignoring roads or even entire towns, and pretending they are pristine rainforests. IEG encourages that by the third year, the map resolution should be "1 to 10 meters," but the initial reference values could be developed with a resolution as bad as 1 kilometer.[163]

But these problems pale in comparison with the next steps in the process: determining the condition of the ecosystem and the value of the ecosystem services they produce. Ecosystem services metrics, and the choice of metrics or services, are highly subjective. Further, the NYSE would have directed NACs to report measures of natural "production" that are inherently not quantifiable or which are not properly considered production at all. Many categories boil down to fuzzy feelings about the environment that have been transposed into a climate academic's idea of accounting terms.

Consider the ecosystem service of "[l]ocal (micro and meso) climate regulation services," which includes the "ecosystem's contributions to the regulation of ambient atmospheric conditions . . . through the presence of vegetation that improves the living conditions for people and supports economic production."[164] Examples include "the evaporative cooling provided by urban trees ('green space')" . . . and the contribution of trees in providing shade" and "the role of urban water bodies ('blue space')."[165] IEG does not suggest in what units "improve[d] . . . living conditions for people" provided by "shade" should be measured, if such a thing is even possible. Also, the "role of urban water bodies" in doing what? IEG does not say.

Another is "[o]rnamental resources," which include the "ecosystem's contribution to the provisioning of resources for clothing, jewelry, handicraft, worship, and decoration."[166] It is difficult to imagine what these "uses" could be outside of the context of a market transaction. What are "resources for . . . worship" here, and how would they be measured? Surely IEG does not intend the Babelic goal of assigning the sacred a human monetary value.

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[161] *Id*. at 67–68.
[162] INT'L UNION FOR CONSERVATION OF NATURE, IUCN GLOBAL ECOSYSTEM TYPOLOGY 2.0 (David A. Keith et al. eds., 2020), http://tinyurl.com/bdezs7hy.
[163] Ex. 3, *supra* note 55, at 67–68.
[164] Ex. 3, *supra* note 55, at 73.
[165] *Id*. at 73.
[166] *Id*. at 72.

A related category is "[s]piritual, artistic, and symbolic services," which includes the environment's contribution to matters of "cultural, historical, aesthetic, sacred or religious significance."[167] IEG elaborates that these "services may underpin people's cultural identity and may inspire people to express themselves through various artistic media."[168] This category also has not even a theoretical limit.

Similarly, "[v]isual amenity services" are "contributions to local living conditions through the biophysical characteristics and qualities of ecosystems that provide sensory benefits, especially visual."[169] In other words, the framework would have NACs assign monetary value to how people feel when they look at the land. But eyesight is just one of the human senses that NACs would purport to monetize. NACs would claim value to cognition, too. "Education, scientific, and research services" are "contributions through the biophysical characteristics and qualities of ecosystems, that enable people to use the environment through intellectual interactions with the environment."[170]

Simply reading these "accounting" categories in plain English reveals their absurdity. Yet this is what the NYSE would have had investors peruse as if they were akin to the cost of goods sold. The emperor truly has no clothes.

After a NAC has produced measurements of these ecosystem services, the next step is to "assign an economic value" to them.[171] Here the process becomes even more bewildering. Although the framework employs certain accounting methods that have some economic basis on their own, they break down entirely when applied to NACs' environmental gobbledygook.

At this stage of the process, "the physical units of ecosystem services are given a dollar value." The IEG framework relies heavily on SEEA–EA, which provides various options. Where market data is lacking, the framework directs NACs to choose among "production function" and "hedonic pricing" methods, which value ecosystem services by measuring changes in the prices of *other* goods and assets to which the ecosystem somehow relates. For example, if home prices in neighborhoods near a NAC increase, and a NAC determined that the "cultural" or "aesthetic" value of the NAC's natural assets also increased, the NAC could value its natural assets based on the rise in home prices.[172] Never mind that correlation does not establish causation. Because the underlying "cultural" or "aesthetic" value of natural assets is subjective,

[167] *Id*. at 76.
[168] *Id*.
[169] *Id*. at 75–76.
[170] *Id*. at 76.
[171] *Id*. at 84.
[172] *System of Environmental-Economic Accounting–Ecosystem* Accounting, UNITED NATIONS at 196–97 (Sept. 29, 2021), http://tinyurl.com/3vrjser8.

NACs would practically be free to align their valuation to whatever external market patterns happen to be most favorable at the time.

The rule would have instructed NAC accountants in still darker arts. The accounting methods discussed above at least attempt to mimic market prices, however unrealistic they may be. But the IEG framework endorses methods that even the UN disclaims. For the framework's "option" and "non-use" values, IEG directs NACs to "follow[] the structure and reporting format of SEEA EA (Chapter 12)."[173] Chapter 12 of the UN SEEA-EA's framework is titled "Complementary approaches to valuation," and focuses on valuation concepts that involve so-called "welfare" values."[174] While accounting is based on the "exchange value" demonstrated in market transactions, viz., the world as it is, "welfare values . . . reflect[] alternative management regimes or institutional arrangements," viz., not what the market values, but what it *should* value. The UN then raises an economist's version of a "Danger: Proceed With Caution" sign:

> [A]pplication of this approach has proved challenging due to the difficulties of selecting and measuring the range of possible adjustments for all aspects of social welfare . . . [and] the 2008 [UN System of National Accounts] warns against a welfare interpretation . . . [T]he main objective of the SNA is to compile measures of economic activity in accordance with strict accounting conventions based on economic principles.[175]

By implication, "welfare" value methods are not based on financial accounting. They are not accepted in national accounting, let alone the financial accounting on which national accounting is based.

It's easy to see why. The UN explains that "[a]ccounting approaches explicitly do not account for externalities" because externalities "are not exchanges but rather outcomes that arise as a consequence of other activities."[176] "Welfare" values, by contrast, can internalize externalities by taking into account "the wider social costs and benefits of a given project, activity, or policy."[177] For example, welfare methods can account for the "social" harms of environmental degradation by adding faux surcharges like "unpaid ecological costs" to everyone else's accounts. Or natural assets can be inflated by assuming an eschatological "greened economy" model in which consumers demand them at whatever level climate economists say they

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[173] Ex. 3, *supra* note 55, at 89.
[174] United Nations, *supra* note 172, at 256.
[175] *Id.* at 257 (cleaned up).
[176] *Id.* at 259.
[177] *Id.*

should.[178] As the UN admits in its own, muted way, this is not accounting but a social experiment.

Nevertheless, IEG persisted. The IEG framework discloses none of these nuances, which even the UN explains. FDR decried "the ancient rule of caveat emptor" to campaign for reforms that ultimately became the federal securities laws.[179] IEG would do otherwise by inviting fraud and deception in NAC financial reporting.

iii. Reporting public goods as company assets would have confused and misled investors.

The NYSE attempted to launder its deceptive accounting schemes as "rigorous quantitative financial requirements" that would have subjected NACs to "the same" filing requirements as all other NYSE listed companies.[180] But these requirements were designed to mislead. The rule aimed to give NACs' preposterous natural capital figures the accoutrements of standard financial accounting. No matter how they were dressed, these reports would have been as official as Caligula's horse.[181]

First, NACs' ecological reports would have been required to be published at least annually, likely at or around the same time as traditional financials. A NAC would be required to publish its annual ecological report no later than the date it files its annual report with the SEC, It would be required to cover the same fiscal periods as the audited financial statements included in the NAC's annual report on SEC Form 10-K and other applicable SEC filings. NACs must have published their annual ecological reports no later than when it filed its annual report with the SEC.

NACs ecological reports would have even been given equal status as SEC filings. Under existing NYSE rules, companies must immediately release disclose material news developments.[182] Companies that fail to file SEC annual and quarterly reports are deemed delinquent and are subject to trading suspensions and delisting unless they resolve the delinquency during a cure period.[183] NACs would have subject to identical requirements for their ecological reports.[184]

Further, NACs would have been required to give even greater attention to ecological reports than traditional annual reports. Even if a NAC was incapable of

[178] *Id*. at 267.
[179] SELIGMAN, *supra* note 28 at 53.
[180] 88 Fed. Reg. 68,817.
[181] SUETONIUS, THE LIVES OF THE TWELVE CAESARS 464 (Alexander Thomson trans., 2006).
[182] NYSE LISTED COMPANY MANUAL §§ 202.05, 202.06.
[183] *Id*. § 802.01E.
[184] Ex. 5, *supra* note 23, at 117–118.

filing its standard annual report, it was still required to file its ecological report.[185] NACs were also required to immediately release any event anticipated to have a material adverse effect on any natural criteria disclosed in the NAC's ecological performance reports.[186]

Second, NACs' environmental reporting would have used similar acronyms and phrases as traditional accounting, such as "Total Economic Value (TEV)" (read: Total Enterprise Value (TEV)) that includes the value of natural assets. Third, NACs' environmental and social benefit accounting would have been required to be audited like financial accounting. NACs' ecological reports, technical studies, and equitable benefit sharing reports would have been examined by a PCAOB-registered and independent public accounting firm and accompanied by an examination level report that complies with the attestation standards of the PCAOB or AICPA.

These requirements were designed to make NACs' environmental and social reporting mimic traditional SEC filings. This is yet another way that the NACs rule would have misled investors.

2. *The listing standard's novel corporate governance mechanisms would have exposed investors to fraud and manipulative practices.*

i. The listing standard's definition of "sustainable operations" was vague and arbitrary.

The listing standard required that all NAC operations be "sustainable" and prohibited a NAC from engaging "directly or indirectly in unsustainable activities." Examples of impermissible land uses listed included "traditional fossil fuel development, mining, unsustainable logging, or perpetuating industrial agriculture."[187]

These examples were vague and arbitrary. Take "traditional fossil fuel development." What does traditional mean? Hydraulic fracturing is very innovative and not "traditionally" how natural gas resources were developed. Is fracking "traditional"? Oil refiners today used new technologies to mitigate their carbon footprint, including carbon-capture-and-storage. Is any modern oil or gas extraction "traditional"?

According to the NYSE, the answer was a definite no. The NYSE's definition of "sustainable operations"—coupled with the proposed accounting framework—would have prevented any disturbance of land to drill for oil or gas, even for oil or gas ultimately used to replace inefficient biomass that destroys forests and kills the poor,

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[185] *Id.* at 117.
[186] *Id.* at 113.
[187] Ex. 5, *supra* note 23, at 110.

thereby improving human lives and preserving natural land across world.[188] That kind of consumer surplus and public benefit didn't matter to NACs.

Or take "unsustainable logging." For most, that would mean the rate of logging cannot exceed the growth rate of the forest area. But the NYSE had something quite different in mind. Logging, under the rule's accounting framework, would have been reported as a loss of the area's carbon stocks, and hence a worsening of the asset's material condition, even if the carbon was stored in wood for decades. It appears, then, that no logging at any meaningful scale would be "sustainable." The word "sustainable" is surplusage.

Or take "perpetuating industrial agriculture." How did the modifier "industrial" change the meaning of "agriculture"? Dictionary definitions of "industry" include "a manufacturing activity as a whole" or "systematic labor especially for some useful purpose or the creation of something value."[189] The NYSE mentioned the "production of regenerative crops" as an example of agriculture that is not "industrial." But regenerative agriculture still uses industrial methods. Certainly, the use of tractors or motor engines in regenerative agriculture is "industrial." Would the rule have required these farms to rely on animal power? That is not a workable definition, and the rules' vague definition of "sustainable" gave little guidance.

If the NYSE intended to prohibit the presently unfashionable "monoculture"—presumably, growing corn or soybeans—then it should have just said so. Even IEG's CEO even admitted that the NYSE's rule "called out industries we didn't need to."[190]

There are more fish in this barrel. Defining the term by using the term itself, the rule said that "unsustainable activities" included "unsustainable logging," while every other activity listed was not modified by a repetitive "unsustainable." Does that mean that logging was allowed to a greater extent than the other activities listed? The only activity that had no modifier was "mining"; does that mean mining was prohibited to a greater extent than the other activities? And what would it mean to "indirectly" engage in unsustainable activities? The NYSE said a NAC could sell carbon credits, but what if the purchasers were traditional oil-and-gas producers? Would that "indirectly" engage in unsustainable activities? What about the private jet emissions of wealthy "ecotourists"? The rule supplied no answer.

The consequences of such vagueness would have been steep. Starved of revenue, NACs would have been desperate to push the limits of what they could do (assuming, charitably, that they would seek to make material amounts of revenue at

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[188] *See generally* LIBERTY ENERGY, BETTERING HUMAN LIVES (2022), http://tinyurl.com/yuyv9bxy.
[189] *Industry*, MERRIAM WEBSTER, http://tinyurl.com/2h29ukrj.
[190] AGRIPULSE, *supra* note **Error! Bookmark not defined.**.

all). But a NAC could be de-listed for doing anything that doesn't qualify as "sustainable." "'I'll know it when I see it' is not a practice currently recognized in administrative law."[191] The rule left the answer in the NYSE's (and IEG's) unmerited discretion.

ii. The "Equitable Benefit Sharing" rule would have required investors to cede corporate control to ill-defined "community" groups whose interests conflict with investors.

The listing standard would have vested the control of certain NACs in ill-defined community groups, leaving NACs wide open to conflicts of interest and investor dilution as the only remedy.

NACs would have had to distribute 50 percent of their common stock to "Local Communities," which the rule "defined" as "groups of people—including indigenous peoples and other local groups—who have direct ties and derive livelihood or cultural values from the area to which a NAC holds a license."

50 percent is a magic number because it grants corporate control.[192] Whoever receives the grant under the rule would have had effective control over the NAC. To non-controlling investors like the retail investors, this would have mattered because the controllers may not have shared their interests making a return on their investments. This is especially the case because the "Local Community" controllers—whoever they would be—would receive their shares for free, as a donation by the NAC. They wouldn't have even a cost-basis interest in financial returns. They would financially benefit from the transaction even if the NAC's value declined substantially.

The rule also did not explain what it means to give shares to "groups of people," "peoples" or "local groups." "Groups of people" cannot own title to shares; only individual persons can. Of course, groups of people can own shares as several or many individual persons or as organizations. But the rule gave no guidance as to the capacity in which the ultimate transferees would receive the shares. There was nothing that would prohibit a NAC from granting control to a government such as a municipality, for example, which would be a natural move for a license agreement concerning public lands. Or the controlling share could be given to a nonprofit. In either case, the new controllers may not have shared investors' interests in turning a

[191] SEC Comm'r Hester Peirce, Statement on Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies (May 25, 2022), http://tinyurl.com/2rvch2dw.
[192] *See In re PNB Holding Co. S'holders Litig.*, No. 28-N, 2006 WL 2403999 at *9 (Del. Ch. Aug. 18, 2006).

profit. In the case of a nonprofit, the new controller might have been legally limited in the extent to which they could exercise their control to generate financial returns.

The rule also provided that the NAC may place the stock in a trust for the benefit of the intended beneficiaries, but this did not resolve the issue. The NAC would still have had to identify the beneficiaries, and the rule provided no limiting principle for who they could be.

The "definition" of "Local Communities" was really no definition at all. The eligible population for "groups of people . . . who have direct ties and derive livelihood or cultural values" to an area is vast. Start with "direct ties." Must the group have lived in the area? If so, how recently? Do historic ties count? What about a group that has no residential connection but who visits the area regularly? Or a group that has no ties and does not visit but for whom an area has religious significance? Discretion lay with the NAC manager.

Next, what would it mean to "derive . . . cultural values" from a geographic area? Culture is a product of human civilization. A geographic area, in itself, has no "culture." The definition thus would have admitted groups that have little connection to an area but claim belief in "values" that are somehow connected to it. An environmentalist group that organizes eco-tourism for its members could proclaim that its "values" are derived from the areas it visits. Country club members that like to play golf nearby might derive aesthetic and cultural values from the land. The possibilities were endless.

Finally, the rule was also unclear about when the 50 percent share distribution requirement applies. It said the 50 percent requirement applied when the NAC has entered into "a license agreement with respect to public lands," but the 5 percent requirement applied when the NAC either "owns the land" or has entered into a license agreement "with respect to private lands." What would happen when a NAC has arrangements for both public and private lands? Would the 50-percent requirement apply as long as a NAC had an agreement "with respect to public lands," even if had other agreements for private lands? Was a NAC limited to only one license agreement? What about a single license agreement that is "with respect to" lands that include both public and private lands?

The NACs rule would have invited investors to participate in an opaque mess of conflicting incentives. This too would have invited fraud.

D. The Listing Standard Was Designed To Regulate Matters Unrelated to the Purposes of the Exchange Act.

The NYSE made no secret of its intent with the NACs rule. The NACs rule was designed to direct capital flows to a particular brand of sustainability-themed

investments: NACs. This design presented at least two issues. First, merits regulation is not within the Exchange Act's purposes, let alone merits based on *environmental* considerations that are the jurisdiction of other federal statutes. Second, NACs' novel and bespoke design would have overridden and inverted several aspects of state corporate law. Neither of these purposes are consistent with the Exchange Act.

1. The listing standard was designed to regulate land use, not securities transactions.

The rule explicitly aimed to regulate land uses in order to redirect capital flows away from productive uses of land such as mining, agriculture, and oil and gas extraction, and toward preventing "degradation" of ecosystems and climate change. "Ending the overconsumption of and underinvestment in nature" and ensuring a "transition to a more sustainable, resilient, and equitable economy," the NYSE explained, required listing NACs.[193] These might have been the NYSE's purposes, but they are not purposes the Exchange Act recognizes.

The "touchstone" of the Exchange Act is "the presence of an investment . . . premised on a reasonable expectation of profits."[194] The Exchange Act requires that the SEC evaluate stock exchange rules to determine whether they protect investors and advance the public interest, which involves whether they promote efficiency, competition, and capital formation.

NACs need not have any expectation of profit at all. In fact, they need not earn any cash, ever, and they are supposed to subordinate potential profits to "ecological performance." They were required to destroy capital, not create it.[195]

The NYSE proposed the rule in an attempt regulate land use, a matter not related to the Exchange Act. The NYSE diagnosed that "[c]apital flows directed to biodiversity conservation, renewable energy, regenerative agriculture, and other direct investments needed to facilitate a transition to a sustainable economy are insufficient."[196] The NYSE's remedy was to "direct[]" "capital flows" to NACs in order "to maintain and restore natural assets."[197]

NACs would have been subject to a comprehensive regulatory regime focused on land management consistent with certain environmental sustainability concepts. It wasn't enough that NACs would have been environmentally friendly, responsible, or sustainable, as many existing public companies already are. NACs must have

[193] See 88 Fed. Reg. at 68,812.
[194] *SEC v. Edwards*, 540 U.S. 389, 395 (2004).
[195] *See supra* Part IV.A.3.
[196] 88 Fed. Reg. at 68,812.
[197] *Id.* at 68,818.

sought to "grow the value of natural assets and their production of ecosystem services" to "maximiz[e] ecological performance." These are prescribed terms, not principles. A land user could comply with all applicable environmental laws and still violate NACs' manifold restrictions that subject every possible activity a user could take to a gauntlet of sustainability tests.

The NACs rule wasn't about getting investors "pure-play exposure to nature and climate." NACs couldn't have just participated in the performance of an existing land area managed by others. The NAC itself must have had "the authority to manage the area."[198] There was no basis for this requirement other than to regulate land management. Nor were NACs limited in scope to private lands. The rule expressly envisioned NACs managing public lands. The rule allows public lands, even national parks, to be managed by NACs.

The Exchange Act says nothing about the environment, sustainability, or land use. Within federal law, the regulation of public lands to promote public goods is the province of acts other than the Exchange Act, and other agencies than the SEC or actors like NYSE. The Federal Land Policy and Management Act and the Bureau of Land Management regulate the use of public lands. The NACs rule was a federal end-run around this division of labor.

The rule would have practically invited conflict. BLM can permit the leasing of public lands for economic uses like logging, but NACs couldn't. BLM must take into account the costs to the public of keeping land locked up in unproductive uses (or non-uses). But NACs did not have to do that. To the contrary, NACs would have been able to use an accounting system that falsely attributes monetary value to non-use.

The Exchange Act does not authorize land management. The NYSE and IEG should have taken their land-use ideas elsewhere.

2. The listing standard would have inverted state corporation law.

The Exchange Act is disclosure-oriented and does not abrogate the firmly established state jurisdiction over corporate governance. Listing standards consistent with the Exchange Act may not seek to modify state corporate law. Yet the proposed rule was littered with blatant attempts to regulate traditional state corporate-law issues. It aimed to modify the corporate fiduciary duties at the core of state law's system of corporate governance. It also aimed to regulate everyday business, telling businesses certain economic activities they must avoid, up to regulating even the minimum useful life of company assets.

[198] Ex. 5, *supra* note 23, at 109.

No other rule in the listed company manual attempts anything close to this depth or breadth of regulation. Nor does even any state corporation statute. The NACs rule was a bald attempt to work around state corporate law by inventing a new kind of corporation and giving it the imprimatur of an NYSE listing, likely with the expectation that states would come around to it eventually. That goal cannot be consistent with the Exchange Act.

The Exchange Act does not authorize the regulation of corporate governance matters that are traditionally regulated under state law. In *Business Roundtable v. SEC*, the D.C. Circuit held that the Exchange Act's authority "cannot be understood to include regulation" of "the substantive allocation of powers" in matters of "corporate governance traditionally left to the states."[199] For example, the Senate report for the Exchange Act denied that Congress "g[a]ve the Commission 'power to interfere in the management of corporations'" and maintained "that the bill 'furnish[ed] no justification for such an interpretation.'"[200]

The fiduciary duties of corporate directors to shareholders lie at the heart of state corporation law. As discussed in Part IV.B.1 *supra*, the NACs rule would invert these state-law fiduciary duties by subordinating any financial interest to the social goal of maximizing ecological performance. If NACs would have ever listed on the NYSE, it would have been because state law *changed* to permit them to exist.

The NYSE would self-evidently exceed the Exchange Act's authority if it required existing listed companies to modify their state-law fiduciary duties.[201] It couldn't evade this outcome by launching a new class of companies that did not presently exist.

The rule was also inconsistent with another aspect of state corporate law. State corporation law provides that the management of everyday business is within the sole discretion of a corporation's board of directors.[202] Yet the NACs rule would have micromanaged many aspects of business.

The listing standard read more like an employee manual than a stock exchange rule. The rule subjected "revenue-generating operations"—the bread and butter economic enterprise—to conditions that the operations seek to replenish natural resources and not negatively affect natural assets.[203] It required that NAC funds, including any capital raised by issuing securities, be used "primarily" to meet the

[199] 905 F.2d 406, 407–08 (D.C. Cir. 1990).
[200] *Id.* at 411 (quoting S. Rep. 73-792, at *10 (1934)).
[201] *Cf. id.* at 412. ("[The Exchange Act does not provide the Commission *carte blanche* to adopt federal corporate governance standards through the back door by mandating uniform listing standards.").
[202] DEL. CODE tit. 8 § 141(a).
[203] Ex. 5, *supra* note 23, at 109–110.

NAC's "operational needs" to fulfill its purpose.[204] It prohibited NACs from engaging "directly or indirectly" in "unsustainable activities," such as "traditional fossil fuel development, mining, logging, or perpetuating industrial agriculture."[205] It required NACs to adopt social-policy commitments, including an "Environmental and Social Policy that articulates the objectives and principles that will guide the NAC to achieve sound environmental and social performance."[206] It even set a minimum useful life for company assets, requiring that any license agreement held by a NAC have a term of at least 10 years.[207] As discussed *supra*, with these labyrinthine restrictions, it is difficult to imagine what business activities NACs could have done.

This micromanagement of businesses that list as NACs would have been unlike other, valid stock exchange regulations, which regulate business conduct as it relates to facilitating an efficient market in company securities. Even exchanges' more questionable corporate governance listing standards relate to board-level affairs and not management.[208] The NACs rule was an attempt to enact state corporate law by another means, which isn't what exchange listing standards are for.

V. Conclusion

For the foregoing reasons, the NACs rule was clearly not authorized by the Exchange Act. The NYSE was right to withdraw it from consideration.

/s/

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[204] *Id*. at 110.
[205] *Id*.
[206] *Id*. at 110–11.
[207] *Id*. at 113.
[208] *E.g.*, NYSE LISTED COMPANY MANUAL § 303A.