WESTERN ENERGY ALLIANCE

January 17, 2024

Honorable Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the NYSE Listed Company Manual To Adopt Listing Standards for Natural Asset Companies, File Number: SR–NYSE–2023–09

Dear Secretary Countryman:

Western Energy Alliance opposes the Securities and Exchange Commission's rule to amend the NYSE listed company manual to create Natural Asset Companies (NAC). With the rule, SEC would create a novel category of company that is the brainchild of one company, Intrinsic Exchange Group (IEG). In essence, SEC would be setting broad policy on the novel concept of monetizing ecological values of public and private lands without any mandate from Congress, meaningful engagement with the public, nor an interactive democratic process that normally surrounds such substantial policymaking. One company setting the definition, reporting, and accountability standards for a whole category of company combined with a mere two months of public comment to an obscure SEC rule relating to NYSE listings hardly is adequate for a proposal of this magnitude. Further, SEC would grant IEG a monopoly with its proprietary structure to receive an unspecified share of the revenue generated by all future NACs.

Western Energy Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. Most independent producers are small businesses, with an average of fourteen employees.

As a western-based organization, Western Energy Alliance has extensive experience with federal public lands issues. The western states where our members operate collectively consist of about 50% federal lands. The vast majority of federal lands and the federal mineral estate is in the West. Our experience with public lands issues causes us to look with alarm at the proposed rule. We are concerned that SEC has not considered how a proposed rule to grant companies authority to manage natural resources on public lands conflicts with the jurisdiction of federal land management agencies and their governing statutes.

Broader Policy Implications

The proposed rule repeatedly describes NACs as controlling natural assets[1] and that NACs can license their rights from sovereign nations[2] and governmental entities.[3] Therefore, it is clear that SEC and IEG conceive of NACs as controlling natural resources on federal public lands and tribal lands, including to the exclusion of congressionally mandated multiple uses, which are deemed "unsustainable" by the rule.

> "Under the proposal, all NACs would be prohibited from directly or indirectly conducting unsustainable activities, such as mining, that lead to the degradation of the ecosystems it is trying to protect." (p. 89788)

Clearly SEC has not considered the interaction of the rule with federal lands statutes. In fact, the Bureau of Land Management (BLM), the largest federal public lands management agency, is governed by its organic statute, the Federal Land Policy and Management Act (FLPMA). In FLPMA, Congress mandated that the "principal or major uses" of public lands, include "mineral exploration and production." *See* 43 U.S.C. § 1702(l). SEC's proposed rule envisions companies controlling resource values on public lands rather than federal land managers, which raises a whole host of questions.

How would these NACs interact with federal land managers? How can NACs control natural resource values on public lands, which are owned by all Americans? How would the proceeds be shared with the American people? How does this rule interact with FLPMA, which defines mining, timber, and energy development as principal uses on public lands? How can NACs preclude such activities on federal lands when FLPMA requires their production and "sustained yield?" Since Indian tribes are sovereign nations, how does SEC envision NACs operate on tribal lands and interact with the federal government given the Department of the Interior's trust responsibility to maximize benefits to tribes?

Those questions show that SEC has not clearly thought out the implications of the proposed rule when it comes to public and tribal lands. It does not appear to us that SEC has the authority to convey to NACs the right to control resources on federal public lands when Congress has given that authority to federal land management agencies such as the U.S. Department of Agriculture's Forest Service and the Department of the Interior's BLM. Congress has spoken clearly in FLPMA that natural resource values, in

[1] For example, see page 89788 of the proposed rule: "As proposed, sustainable operations are those activities that do not cause any material adverse impact on the condition of the natural assets under a NAC's *control* and that seek to replenish the natural resources being used." All references to the proposed rule are for the version published in the Federal Register on December 28, 2023, except where noted otherwise.
[2] "The Exchange states that these rights could be licensed like other rights…and that NACs would be expected to license these rights from *sovereign nations* or private landowners." (proposed rule p. 89788)
[3] "The Exchange states that NACs would acquire the ecological performance rights of a designated area by entering into an agreement with the natural asset owner (e.g., a *governmental entity* or private landowner) to obtain a license with respect to such rights." (p. 89791)

SEC's rule termed natural assets, are to be protected on BLM-managed lands and the federal mineral estate. Under what authority does SEC convey resource values to companies? It does not appear that SEC has properly considered these larger implications.

Moreover, it is highly unusual for a government agency to issue a proposed rule for a concept developed by just one company. SEC and NYSE should be forthcoming on the interactions with IEG and release records of the communications between IEG and them, which should be part of the record for the public to review. Not only has the NYSE and SEC taken the concept from IEG and given it a share of all revenue into the future, but SEC has also delegated the development of the oversight and reporting structure to this one company. The insular conception of the rule is exacerbated by the fact that IEG has lifted the reporting and accountability structure largely from United Nations standards.

> "The EPR produced by a NAC must follow IEG's Ecological Performance Reporting Framework (the ''Reporting Framework''). The Framework, in turn, is based on the natural capital accounting standards established in the United Nations System of Environmental-Economic Accounting—Ecosystem Accounting Framework ('SEEA EA')." (p. 89789)

> "The Exchange states that, in addition to the GAAP financial statements required under Commission disclosure rules and the proposed EPR that would be derived from a Technical EP Study, it proposes to require NACs to provide website disclosures that it states are designed to provide transparency regarding the NAC's social and environmental objectives. These would include requiring NACs to adopt and publish an Environmental and Social Policy, a Biodiversity Policy, a Human Rights Policy, consistent with the United Nations Guiding Principles on Business and Human Rights…" (p. 89789)

The United Nations does not set policy for the United States, and certainly not without authority from Congress. But even were the use of a UN standard to be accepted, such a policy choice must be subjected to a robust, democratic processes. In this regard as well the SEC rule falls short. Even with the reopening of the comment period, public participation is disproportionately short compared to the magnitude of the proposal. The roughly two-month comment period is not adequate for the public and Congress to assess the UN reporting frameworks used and the broader implications of ceding policymaking to a supranational organization without jurisdiction.

Again pointing to the fact that SEC and NYSE have not considered the larger implications of the rule and federal lands policy, SEC has not adequately considered oversight of NACs. As the monetization of natural resource and ecological values is such a new concept with ill-defined standards, it is not evident that the audit committee structure conceived in the proposed rule is adequate to properly account for whether the ecological performance of a NAC is positive, negative, properly reported, fairly monetized,

etc. What are the qualification standards for Independent Reviewers? Such large policy questions should be the purview of Congress. SEC has not shown a strong legal basis for this policy, indicating it may run afoul of the Major Questions Doctrine.

Further in contravention of FLPMA, the SEC rule enters the realm of regulating oil and natural gas and other multiple uses on federal lands. In FLPMA, Congress directed that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands[.]" 43 U.S.C. § 1701a)(12). FLPMA's multiple-use mandate requires BLM to manage "the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people…" 43 U.S.C. § 1702(c). Courts have expressly recognized that one use that BLM must balance with others includes "the nation's immediate and long-term need for energy resources." *Theodore Roosevelt Conservation P'ship v. Salazar*, 744 F. Supp. 2d 151, 157 (D.D.C. 2010). Given statute and case law on public lands, it does not appear that SEC has the ability to grant companies filing as NACs control of resources on public lands such that they can be used to prevent activities such as mining or energy development.

Perhaps SEC is anticipating that BLM's proposed conservation rule that allows for ten-year conservation leases will be finalized and that NACs could hold and monetize conservation leases. We described in our comments to BLM's conservation rule how it is on shaky legal groups and likely in violation of FLPMA.[4] SEC's proposed rule language as it relates to NACs holding ecological performance rights (EPR) on federal public lands is certainly premature without a final BLM rule.

Revenue Sharing

We find SEC's language on revenue sharing to be extremely problematic.

> "An Equitable Benefit Sharing Policy that articulates the NAC's commitment for sharing benefits with local communities. A NAC must include in its license agreement with the licensor a provision requiring the licensor to comply with the applicable terms of the Equitable Benefit Sharing Policy. The Exchange proposes that Equitable Benefit Sharing Policy must require an equitable benefit sharing arrangement for the distribution of shares of the NAC's common stock to local communities, which the Exchange states would be those who have direct ties to and derive livelihood or cultural values from the applicable area. As proposed, the NAC's common stock distribution would be required to be completed no later than the time of closing of the NAC's IPO and meet the following requirements at a minimum: If the NAC has entered into a

[4] *Western Energy Alliance et al. comment letter to BLM on the Conservation and Landscape Health Rule*, July 5, 2023.

> license agreement with respect to public lands, shares representing at least 50% of the shares of the NAC's outstanding shares as of the closing of the IPO must be distributed to local communities." (p. 89791)

"Communities" is an extremely fluid term. In common parlance, communities can refer to physical communities in a locality; communities that share common interests, including ideological interests; those sharing an ethnicity or race; and other definitions. The definition given for "Local Communities" in the Key Terms list is too vague and broad. What is to prevent a NAC from defining "community" in its Equitable Benefits Sharing Policy as organized around like-minded individuals rather than all members of the physical local community that are impacted? The broad definition is problematic and would be better specified as local counties, municipalities, or Indian tribes than the fluid term "community," as these entities are governed by elected officials held accountable by voters. How is there accountability for the leaders of these ill-defined communities? Further the inclusion of "or cultural values" in the definition is problematic. People can derive cultural values from areas that are far away but culturally relevant. A more narrow definition of "Local Communities" focused on local government entities would ensure that the revenue sharing would not be too diffuse.

Further, precluding oil and natural gas development on public lands deprives local communities near public lands from benefiting from jobs, tax revenue, and economic impact associated with that development. Often the preferred "sustainable" activities that are contemplated by this proposed rule generate much less value for local communities.[5] We realize that the intent of the rule is to monetize the values of ecological resources, but it is far from clear how successful NACs will be in doing so compared to those productive activities that provide resources that Americans use every day and have intrinsic value in the marketplace. It is more likely than not that local communities that now benefit from energy and mining activities on public lands would be much worse off if NACs and the licensing agreements envisioned by the rule result in less energy and mining activities.

The rule fails to account for the fact that ownership of public lands is not just by local communities but Americans writ large. For that reason, oil and natural gas companies that operate on federal lands pay lease fees and royalties into the U.S. Treasury. That revenue, around $8.6 billion in 2022, is shared with the states where the revenue is generated for such uses as compensating counties and municipalities where the development occurs. We believe it is a major flaw of the rule that corporations would be able to license and monetarily benefit from their use of public lands without paying similar royalties.

Further, the rule only contemplates support for local communities based on the shares of the NAC. That does not seem to be fair compensation to communities, or as we suggest, various levels of government.

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[5] *The BLM: A Sound Investment for America 2022* includes data on economic impact generated on BLM-managed lands. Of the $120.8 billion of economic impact BLM details, the very activities the SEC rule deems unsustainable provide $101.8 billion (84%) of the impact: oil and natural gas $65.7 billion (54%) and mining $36.1 (30%), dwarfing the next largest contributors of recreation $7.6 billion (6%), and renewables $3 billion (2.5%).

A NAC could be poorly managed and squander the ecological resources under its control, causing its shares to devalue and leaving the communities without just compensation. Under a royalty system, the company pays the federal government a royalty—as well as localities and states property, income, and severance taxes—based on production, regardless of how well or poorly the company's stock performs on the NYSE. SEC does not seem to have seriously considered just compensation to local communities or the American taxpayer when NACs use public resources owned by the American public.

Unsupported Assertions

Finally, returning to the issue of how the proposed rule would set very broad policy by creating a hastily conceived category of company without sufficient mandate from Congress, it contains several assertions with broad policy implications by citing thin or no evidence. For example, the rule asserts that:

> "The Exchange states that its proposal is intended to end the overconsumption of and underinvestment in nature, which requires bringing natural assets into the mainstream…" (p. 89788)

This is an assertion that is not supported by evidence. Indeed, a handful of studies are referenced in the original October 4, 2023 Federal Register release of the proposed rule on page 68812, but that is thin gruel for the magnitude of the statement and the implications of creating NACs. Such broad policy considerations, with pros and cons on both sides, are exactly the purview of Congress and demonstrate why such a change would require a basis in law. A few studies cited do not substitute for a robust democratic process that considers all the broad policy issues touched by this rule, many of which we have raised above.

Further assertions in the rule are factually inaccurate or ill-defined:

> "Capital flows directed to biodiversity conservation, renewable energy, regenerative agriculture, and other direct investments needed to facilitate a transition to a sustainable economy are insufficient due in part to the inability to transparently present the economic case to access these investment dollars based on traditional measures for financial performance." (p. 68812 Oct. 4, 2023 FR)

It is hard to argue that capital flows to renewable energy are insufficient because of an ability to make an economic case for them based on traditional financial performance. In fact, the supply of energy is a very straightforward measurement well captured by financial markets. Billions of dollars of investments have been made into renewable energy projects over many decades. Billions of dollars more of government subsidies have flown into renewable energy, most recently with the Inflation Reduction Act. In fact renewable energy, which is intermittent, is likely overvalued and attracts larger flows of capital than otherwise given the political emphasis on it. The use of NACs as they relate to renewable energy is

not well thought out in the proposed rule and would likely conflict with other laws recently passed by Congress.

Further, the definition of "Sustainable Activities" in the proposed rule prevents the activities to "cause any material adverse impact on the condition of ecosystems." By that definition, renewable energy development such as wind and solar energy projects would not be allowed, as they certainly have adverse impacts on the land in terms of surface disturbance, viewsheds, impacts on wildlife, and mining requirements.[6] "Unsustainable Activities" are defined as "extract[ing] resources without replenishing them," yet wind turbines and solar panels required extremely large amounts of mined minerals.[7]

In conclusion, we appreciate the additional time to comment on the proposed rule, but find inadequate consideration of the policy implications that arise, particularly on federal lands. The conflicts with federal land management agencies and law is very troubling to us. We urge SEC not to proceed with creating NACs as a category of corporation listed on the NYSE.

Sincerely,

Kathleen M. Sgamma
President

[6] Examples include: "Utility-scale solar impacts to volant wildlife," K. Shawn Smallwood, *The Journal of Wildlife Management,* March 24, 2022; "Dogs Detect Larger Wind Energy Effects on Bats and Birds," Smallwood et al., *The Journal of Wildlife Management,* March 26, 2020 estimates increased bat deaths as more wind capacity is installed, reaching over 3 million fatalities in 2019; *Net Zero Impact: Potential Pathways, Infrastructure, and Impacts*, Final Report Summary, Princeton University, October 29, 2021, p. 55, finds net-zero scenarios, low to high, for wind and solar energy would result in land impacts between 62 million and 247 million acres, equivalent to Illinois and Indiana combined on the low side and Arkansas, Iowa, Kansas, Missouri, Nebraska, and Oklahoma on the high side; Environmental impacts of solar photovoltaic systems: A critical review of recent progress and future outlook, Mohammad Tawalbeh et al., *ScienceDirect,* March 10, 2021; "The Dark Side of Solar Power," Atalay Atasu et al., *Harvard Business Review*, June 18, 2021.

[7] "The Hard Math of Minerals," Mark P. Mills, *Issues in Science and Technology,* January 27, 2022 estimates that eliminating fossil fuels would increase demand for mined minerals such as lithium, graphite, nickel, and cobalt rare earths by 4,200%, 2,500%, 1,900% and 700%, respectively, by 2040.