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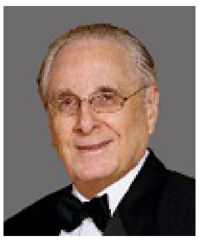
The Sustainability Accounting Standards Board, Insurance Companies and the SEC



By Samuel P. Gunther, Richard H. Murray and Sheila A.S. Gunther

The Sustainability Accounting Standards Board (SASB) is a non-profit organization promoted by individuals and entities that believe Sustainability or Environmental, Social and Governance (ESG) data should be disclosed to investors. In 2013, SASB issued a non-authoritative Conceptual Framework.[1] The Framework presents standards of disclosures of ESG information for use by public companies in Forms 10-K. SASB asserts that these disclosures should appear in Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A). The SASB hopes to convince the Securities and Exchange Comission to require the inclusion of SASB's proposed disclosures in the MD&A sections of 10-Ks. That action would equate the importance of ESG non-financial information with financial reporting. SASB intends to release more than 80 individual industry level sustainability accounting standards that apply the concepts in the Framework. The SEC has not approved the Framework or any sustainability industry standards as authoritative or as appropriate for use in filings with the Commission.

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In February 2014, SASB issued its Insurance Sustainability Accounting Standard.[2]

ISAS presents five sustainability issues which the SASB concludes may be material to insurance companies. These issues are: (1) Environmental Risk Exposure, (2) Policies to Incentivize Responsible Behavior, (3) Plan Performance, (4) Systemic Risk Management

[1] Sustainability Accounting Standard Bd., Conceptual Framework (2013), available at http://www.sasb.org/wp-content/uploads/2013/10/SASB-ConceptualFramework-final-formatted-10-22-13.pdf [hereinafter Framework].

[2] Sustainability Accounting Standard Bd., Insurance Sustainability Accounting Standard (February, 2014) [hereinafter ISAS].

and (5) Integration of ESG Risk Factors in Investment Management. For each of these five ESG issues, ISAS includes: (1) a ''Description'' discussing the rationale for proposed disclosures; and (2) the ''Accounting Metrics'' for specific ESG disclosures. This article discusses SASB's positions in the ISAS and evaluates the prescribed disclosures.

Environmental Risk Exposure. ISAS states that all insurance companies should integrate climate change into their business methodologies to better position themselves to ''*protect* shareholder value.''[3] They should disclose the integration and maximum dollar amount of future catastrophe losses that *could* be incurred. The ISAS asserts:

> Catastrophe losses associated with extreme weather events will continue to have a material, adverse impact on the insurance industry. The extent of this impact is likely to evolve as climate change increases the frequency and severity of both modeled and non-modeled natural catastrophes, including hurricanes, floods, and droughts.[4]

The quoted passage presents conclusions, not analysis. Reporting companies will be required to accept these statements as given facts; however, companies will not be able to apply this standard because ISAS does not demonstrate the bases and explanations for SASB's conclusions. ISAS does not explain what ''extreme weather events'' will ''continue,'' which catastrophes will ''increase in frequency,'' the meaning of ''evolve,'' ''frequency'' and ''severity'' or what it means by ''*protecting*'' shareholder value. SASB does not define ''climate change'' or ''material adverse impact.'' SASB never discloses or documents any valid reasoning supporting its standard.

In stating that ''Catastrophe losses associated with extreme weather events will continue to have a material, adverse impact on the insurance industry,'' SASB provides no analysis of how it reached that conclusion, the time period over which the industry has been affected or how SASB defines the phrase ''material, adverse impact.'' Although, periodically, catastrophe losses by insurers have material impacts on the financial statements of specific insurance underwriters, whether those costs result in ''material adverse impacts'' is uncertain. If the premiums charged in connection with those catastrophes, together with returns on investments generated by those premiums exceed catastrophe costs to those companies, specific carriers may, over the insurance period covered, be profitable. There is no apparent material adverse impact in such instances. If SASB believes that the insurance industry, as a whole, has been incurring net losses due to catastrophes over a significant period of time and those losses reflect a ''material adverse impact,'' the ISAS should say so and offer support for its conclusion.

ISAS states that each insurance company should consider climate change in its ''analysis, pricing, and overall exposure'' to risk of loss from catastrophes of insured parties in order to ''be better positioned to *protect* shareholder value.''[5] ISAS implies that insurance company managements do not understand and carefully evaluate risks of losses when writing catastrophe policies and that SASB knows more about the nature and effects of risks than do the insurance company managements. For many years, insurance companies have employed risk evaluation specialists and actuaries, used sophisticated loss estimating modeling and procedural techniques, employed reinsurance to spread risk, conformed to generally accepted accounting principles in financial statements when estimating risks and losses from underwritten insurance and engaged independent auditors who are experts in examining internal controls and evaluating whether financial statements, including note disclosure, are fairly presented in accordance with generally accepted accounting principles (GAAP). SASB presents no discussion or analysis supporting its assumption that insurance company managements do not understand their business.

ISAS notably makes no reference to SEC Release 9106, ''Commission Guidance Reporting Disclosure Related to Climate Change,'' issued in 2010.[6] That Release provides important guidance to reporting companies about the financial and non-financial information a company should consider when drafting Forms 10-K, including MD&A, and circumstances that require disclosure related to climate change. Release 9106 states that ''The National Association of Insurance Commissioners recently promulgated a uniform standard for mandatory disclosure by insurance companies to state regulators of financial risks due to climate change and actions taken to mitigate them.'' Release 9106 also says, ''We understand that insurance companies are developing new actuarial models and designing new products to reshape coverage for green buildings renewal energy, carbon risk management and directors' and officers' liability, among other actions.'' Moreover, Release 9106 points out that ''Many insurers already have plans in place to address the increased risks that may arise as a result of climate change . . .'' ISAS gives no evidence that SASB considered this critical operative piece of an existing regulation.

ISAS requires disclosure of each insurance company's ''probable maximum loss'' (''PML'') defined as ''the *anticipated* value of the largest monetary loss affecting the registrant's insurance portfolio that *could* result from [future] weather-related natural catastrophes and is based on catastrophic modeling and exceedance probability.''[7] PML, one of many tools used by insurance companies, speculates about what *might happen* in the future and is fundamentally different from estimating losses that *have occurred* by a balance sheet date.

GAAP reporting requires estimating losses from catastrophes that have occurred as of a balance sheet date and prohibits including estimates of losses from catastrophes that have not occurred as of that date. PML disclosures are not GAAP disclosures. PML disclosures are based upon the estimated maximum impact of events that theoretically might occur in the future. PML does not complement or explain GAAP financial statement information. The ISAS mandates disclosure of speculative projections that not only preempts management's stewardship and reporting functions but also requires projections of vague, uncertain future liability informa-

[3] *Id.* at 10.
[4] *Id.*
[5] *Id.*

[6] SEC Securities Act Release No. 33-9106 and Securities Exchange Act Release No. 34-61469, Commission Guidance Regarding Disclosure Related to Climate Change, Feb. 2, 2010 (Release 9106).
[7] ISAS at 10.

tion not required to be disclosed in MD&A. ISAS's requirements subject reporting companies to unnecessary potential securities acts liability, require the quantification of speculative potential future losses and do not present material information under the Supreme Court's *TSC v. Northway* standard.[8]

Mandatory use of the term ''probable'' in ''probable maximum loss'' is dangerous and confusing. GAAP losses are determined based on the well understood FASB definition of ''probable'' that differs dramatically from SASB's PML definition. GAAP disclosures apply to a historical time frame with a finite ending on the balance sheet date. ''Probable'' in PML suggests a much higher likelihood of future occurrence than that which may exist. This is particularly significant because SASB insists that its prescribed disclosures appear in MD&A, not in risk factors, which employs the GAAP definition of ''probable'': likely to occur and reasonably estimable. MD&A would then present two contradictory definitions of ''probable'' in an analysis intended to enlighten investors.

ISAS fails to disclose that PML is not applied consistently in the insurance industry. PML lacks a standard definition and has caused confusion within the industry. Some have recommended discontinuing the use of PML. SASB must, but does not, demonstrate that its definition of PML and the application of that definition, which underlies disclosure mandated by SASB, are standard within the insurance industry. If there is no such standard, SASB has no special expertise to offer such a standard.

Policies Designed to Incentivize Responsible Behavior. ISAS Description states that insurance companies are in a ''unique position'' to generate ''positive social and environmental externalities'' and ''*should* disclose products that incentivize responsible behavior and a low-carbon economy'' to ''demonstrate how shareholder value is being *enhanced*.''[9] SASB believes insurers should develop new policies to produce those results. ISAS requires insurance companies to disclose information about their products that incentivize energy efficiency and low carbon technology by employing environmentally responsible behavior to *enhance* shareholder value.

ISAS does not define ''responsible behavior,'' ''low-carbon economy,'' ''enhanced shareholder value'' or ''positive social and environmental externalities.'' How can registrants understand how to apply terms that are undefined? Moreover, SASB does not explain why ISAS uses ''enhance shareholder value'' here but does not define or explain why ISAS changes its wording and uses ''protect shareholder value'' in the Sections of ISAS on Environmental Risk Exposure and Plan Performance.[10] Without these definitions, ISAS is hollow rather than operative.

ISAS presents conflicting definitions when providing guidance about disclosures to be made. In the Description of Policies to Incentivize Responsible Behavior, ISAS states that registrants, ''*should* disclose products that incentivize responsible behavior and a low-carbon economy.'' In the related Accounting Metrics, SASB states that disclosures ''*shall* include . . . products that incentivize . . . environmentally responsible actions or behaviors.''[11] The Description and the related Accounting Metrics use virtually identical language when characterizing the substance of the disclosures proposed, but the Description says disclosure ''*should*'' be made; whereas, the Accounting Metrics states that disclosures ''*shall*'' be made. No explanation is provided about why the Description and Accounting Metrics are identical except for the words ''should'' and ''shall,'' nor did ISAS address any implications of choices between those terms.

ISAS mandated disclosures require information about premium discounts and net premiums written on policies related to energy efficiency and low carbon technology. SASB implies that ''responsible behavior'' encourages the sale of products that have greater value to reporting companies and their shareholders than do other products, even if the other products are more profitable. The ISAS contains no evidence supporting the assertion that these disclosures demonstrate how or why shareholder value is ''enhanced'' (undefined) by the sale of those favored products. SASB appears to assume a causal relationship between responsible behavior (undefined) and enhanced shareholder value (undefined) but offers no proof of that relationship. Does SASB mean that shareholders' equity on balance sheets will increase because of responsible behavior? Does SASB also mean that seeking a low-carbon economy will increase profitability of the products produced because of responsible behavior? Does SASB mean that even if ESG costs in this effort exceed revenue added by responsible products, shareholder value will increase through the mechanism of the market? If so, that is inconsistent with the views of the first SASB chairman: ''In the absence of substantial innovation, the financial performance of firms declines as their . . . (ESG) performance improves'' and, ''. . . they [the capital markets] don't reward for ESG programs that fail to enhance financial performance, and they punish those whose programs—relevant or not—depress financial results.''[12] If insurance companies are to be compelled to accept SASB postulates as truths, SASB must demonstrate why shareholder value will be enhanced and must also define responsible behavior.

Managements of insurance companies are accountable to their shareholders to maximize net income and shareholder value. Insurance companies have no duty to anyone under the securities laws to ''generate positive social and environmental externalities'' through the sale of products that ''incentivize responsible behavior'' and a ''low-carbon economy'' (all undefined terms). SASB usurps management's determination of which products to produce and prescribes what is material to shareholders. By requiring disclosures about premiums on select products, SASB also intrudes upon the standard for disclosures already addressed by the FASB and by the SEC. ISAS does not describe why profitable relationships with insured entities that do not produce products favoring a low-carbon economy should be disclosed by insurance companies. That is, the disclosure of net premiums on products that incentivize respon-

[8] TSC Industries, Inc. v. Northway, Inc. (426 U.S. 438, 449, June 14, 1976).

[9] ISAS at 14.

[10] ISAS at 10, 15.

[11] ISAS at 14.

[12] ''The Performance Frontier'' by Robert G. Eccles and George Serafeim, Harvard Business Review, May, 2013, pp. 50-60 at 52).

sible behavior may simply be deducted from total net premiums to derive net premiums on products that do not incentivize responsible behavior. If SASB believes that such disclosures should be made because they will discourage insurers from writing insurance on disfavored insureds and if the disclosures are intended to collaterally force those businesses to discontinue disfavored economic activity or to pay a price for continuing to operate disfavored economic activity, SASB must say so. Insurance companies are known major providers of equity and debt financing. ISAS disclosure should be called what it is: pressure placed on insurers to participate in a hit job on disfavored financed industries that may also harm the profitability of insurers, produces no discernable economic benefit to those insurers and is not required by the securities laws. If insurance written on non-incentivized products is profitable and is appropriately reported under GAAP and SEC requirements, investors whose goal is to profit from their investments in insurance companies will be satisfied. SASB offers no explanation for its assertion that its mandated disclosures will be material to profit seeking shareholders. Although such disclosures may interest non-shareholders, they are not the subjects of protection of the securities laws.

Plan Performance. ISAS asserts that insurance companies should make timely payments of claims and provide information about the treatment of customers. ISAS requires disclosure about customer complaints, customer retention, claims information and how insurance companies communicate with customers to *protect* shareholder value. ISAS asserts that companies that make timely claim payments and provide transparent information to policy holders will be better able to retain customers. ISAS requires each company to calculate the ratio of complaints received from customers to claims filed, disclose customer retention rates, the average time to settle claims, and the description of methods of communicating information to customers, all to insure strong plan performance and to ''protect shareholder value'' (undefined phrase).[13]

Through ISAS, SASB directs insurance company managers about how to operate and how and what to communicate to customers. SASB's stating that ''firms that are able to ensure timely claim payments will be better positioned to retain customers and protect shareholder value'' is not instructive. ISAS asserts that micro-managed mandated information must be disclosed in MD&A because this information is purportedly equal in importance to an analysis of financial statements currently required in MD&A. ISAS thus requires companies to detail their ''communications processes'' and how they deal with customers and claims processes. How can the role of adjusters or the use of mail and telephone compare to the level of information the SEC demands for disclosure in MD&A? The only relationship between ''Plan Performance'' and any type of *accounting* occurs because SASB, without evidentiary support, simply labels information it requires to be disclosed *accounting metrics*. This information is immaterial to investors.

ISAS uses the undefined term ''protect'' shareholder value here, as it did in the Section on Environmental Risk Exposure but employs the undefined term ''enhance'' shareholder value in the Section on Incentivizing Responsible Behavior.[14] ISAS does not explain the significance, if any, of using two different terms in conjunction with ''shareholder value'' (undefined).

[13] ISAS at 15.

Systemic Risk Management. The Description of ''Systemic Risk Management'' states that insurance companies engaging in non-traditional or non-insurance activities are more vulnerable to financial market events and are more likely to amplify or contribute to systemic risk. Thus, those companies ''*should enhance* their disclosures of key aspects of systemic risk management.''[15] The Accounting Metrics in this section of ISAS prescribe disclosures of non-policyholder liabilities, notional amounts of credit default swap protection and structured debt securities guaranteed by the reporting company, the value of collateral received from lending securities, the amount of cash received in repo transactions and the dollar amount of life insurance policies and annuities written that can be surrendered by customers over short periods of time.[16] ISAS adds that ''the regulatory implication of this designation [creation of systemic risk] remains undetermined in the U.S.''[17]

The Description's ''*should enhance*'' language contrasts with the requirement in every related Accounting Metric requiring that the related disclosure ''*shall*'' be made. SASB does not explain why it uses ''should'' in the Description but requires that Accounting Metrics disclosures ''shall'' be made. Moreover, ISAS does not explain the implications of using two different terms, neither synonymous with the other, in this section of ISAS.

SASB's Framework expressly states that SASB's objective is to require disclosure of ''non-financial'' information.[18] The Systemic Risk Management section prescribes disclosures that directly contradict SASB's objective stated in its Conceptual Framework. Here each of SASB's mandated Accounting Metrics disclosures concerns information that pertains to financial reporting and financial disclosure matters, not to ESG information. ISAS mandates disclosures on subjects in which SASB has no particular expertise and which are already governed by requirements prescribed by the FASB and by the SEC. Moreover, evaluating and disclosing all material risks defines the essence of insurance and successful insurance company managements. ISAS disclosures intrude upon the expertise of management and of the FASB and the SEC, recognized authorities on financial reporting and MD&A disclosures, and on the expertise of independent auditors who audit financial statements. ISAS adds no required information that benefits shareholders.

Integration of ESG Risk Factors in Investment Management. ISAS states that insurance companies must integrate ESG into their investment planning because failure to do so *could* affect the ability to pay claims. Those factors ''have increasingly been shown to have a material impact on the performance of corporations and other assets.''[19] SASB asserts that insurance companies have ''a responsibility to integrate these factors into the

[14] *Id.* at 14.
[15] *Id.* at 17.
[16] *Id.* at 17-18.
[17] *Id.* at 17.
[18] Framework at 19.
[19] ISAS at 19.

management of their investments''[20] and to disclose how screening investment opportunities, due diligence, technical analysis and risk prioritization are considered in that process.[21] Disclosures *should* include information about how a company considered climate change, natural resource constraints, human rights, and other broad sustainability trends such as offshore outsourcing[22] and how ESG factors are incorporated into diversification strategies and asset allocation.[23] ISAS states that each company must ''identify the specific industries (or sectors) in which it has exposure to [ESG] risks,''[24] how it assesses and identifies ESG risks to its investments,[25] how ESG metrics are incorporated into a company's financial analysis and how that analysis is weighed compared to traditional financial metrics ''in valuation and pricing.''[26] Every company *should* ''quantify its exposure to sustainability risks as a dollar amount of investment in the industries most susceptible to . . . risks . . . identified'' (not mandatory).[27]

Once again, SASB implies that it has a better understanding of how to operate and evaluate the risks of running insurance companies than current management. SASB lists ESG risks for disclosure, although the SEC presently requires management to consider *all* sources of investment risk, including ESG risk, when making required 10-K disclosures. The effects of those efforts are revealed by reporting the fair values of assets in GAAP audited financial statements and in MD&A as mandated by the SEC and the FASB.

ISAS presents no explanation of the bases for its statement that ESG matters have ''*increasingly* been shown to have a *material impact* on the performance of corporations and other *assets*.''[28] ISAS never proves materiality (and increasing materiality) because an ''omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.''[29] If a company that applies ISAS must accept its conclusions as true, then SASB must first demonstrate that the conclusions are accurate by analysis and description of how SASB reached its conclusions. ISAS does not satisfy that requirement. Is it SASB's position that our securities laws are written for the benefit and protection of anyone other than an investor seeking self-enrichment? If so, SASB should say so and specify the bases for its belief.

ISAS asserts preeminence in management investing analysis techniques of insurance companies and requires disclosures of investment portfolio risks in investee businesses involving ''natural resource constraints'' (water, forestry products, fossil fuels, extractives), ''human rights concerns,'' and ''offshore outsourcing.'' Well established GAAP financial statement disclosures and MD&A disclosures required by the SEC and the FASB provide no such automatic disclosure requirements, although some companies may conclude that 10-K risk factors disclosure should be made if applicable. ISAS disclosures directly encroach on the domains of the FASB and the SEC, which have prescribed, well established authoritative financial statement and MD&A disclosures for insurance companies.

ISAS states that ''offshore outsourcing'' presents negative risks to labor and to society.[30] Outsourcing by a company financed by an insurer may occur for numerous reasons including reducing costs by having tasks performed less expensively, accessing technological benefits, reducing its labor force, and opening new markets. That may also translate into increased profitability for the investor insurance company and its shareholders. Offshore outsourcing is done to positively affect an investee company and an insurance company investor and its shareholders. The flaw in ISAS's offshore outsourcing position is its focus on risks to labor and to society rather than on risks to insurance companies and their investors. As SASB admits in its Framework, ''Negative environmental and social externalities [offshore outsourcing] by definition, generally do not currently affect the financial returns of companies that generate them.''[31]

ISAS position on offshore outsourcing is consistent with policy rationale in SASB's Framework. The Framework expressly states that SASB actively solicits and considers the views of shareholders and all non-investor stakeholders when developing standards.[32] Thus, SASB's individual industry disclosure requirements, including ISAS, are directly affected by non-investor stakeholder views.[33] Those views are inherently different from investors who risk capital. Non-shareholder stakeholders' participation in industry working groups has direct effect on defining materiality which is the prerogative of investors as declared in *TSC v. Northway*.

If offshore outsourcing reduces costs and increases profitability materially but imposes social and labor costs, any disclosure required in MD&A is measured by two factors. Those factors are the current impact on results of operations and the reasonable likelihood that the positive effect will recur and be material in the future. Successful offshore outsourcing is favorable to the investee company and to the investor insurance company and its shareholders. The SEC requires MD&A be written ''as seen through the eyes of those who manage the business,'' not as evaluated by non-shareholder stakeholders.[34]

ISAS states that an insurer must disclose ''portfolio risks'' involving ''human rights concerns'' of investees. These ''human rights concerns'' are enumerated in the UN General Assembly's Declaration of Human Rights and include ''reputational risks (negative press coverage and brand damage) associated with violations of basic human rights.''[35]

Problems arise when interpreting and attempting to apply the ISAS policy to specific companies. Analysis

20 *Id.*
21 *Id.*
22 *Id.* at 20.
23 *Id.* at 19.
24 *Id.* at 21.
25 *Id.* at 20.
26 *Id.*
27 *Id.* at 21.
28 *Id.* at 19.
29 *TSC Industries, Inc. v. Northway, Inc.* (426, U.S. 438, 449, June 14, 1976).
30 ISAS at 20, Framework at 18.
31 Framework at 18.
32 *Id.* at 11, 12, 15.
33 *Id.* at 8-10.
34 SEC Securities Act Release No.33-8350 and Securities Exchange Act Release No. 34-48960, Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, December 29, 2003.
35 ISAS at 20.

must determine whether an entity is committing these violations, who makes those determinations and whether the violations are true or merely politically biased positions. ISAS does not address these issues but the answers to these unasked questions are supposed to provide the bases for mandatory 10-K disclosures.

Applying ISAS to human rights introduces subjectivity and uncertainty to SEC filings. U.S. securities law is objective. It requires disclosure of information material to investors. 10-K disclosure by a U.S. insurance company should not be controlled by a UN declaration. Adopting ISAS's human rights provision inserts a new disclosure requirement into 10-Ks but adds no material information for the protection of investors. It is an attempt to introduce foreign policy matters into SEC filings and circumvent the U.S. Congress. The ISAS position on human rights is fraught with ambiguity, confusion and potential bias.

Absence of Important Definitions in ISAS. ''When I use a word,'' Humpty Dumpty said in rather a scornful tone, ''it means just what I choose it to mean – neither more nor less.'' (Lewis Carroll's *Through the Looking Glass*).

Management of every company obliged to conform to the requirements of the ISAS must understand the meanings of the words used in ISAS, the reasons for SASB's conclusions reached in each Description and in Accounting Metrics and SASB's reasons for prescribing required disclosures. However, throughout the ISAS, SASB uses terms that it does not define and which do not have universally agreed upon meanings. ISAS relies on definitions that are obtuse and may connote different meanings to different readers. For example, SASB does not define ''material adverse impact,'' ''climate change,'' ''probable'' ''protect shareholder value,'' ''enhance shareholder value,'' ''responsible behavior,'' ''responsibly,'' and ''set aside.'' The absence of clear and consistent definitions precludes users from understanding how to apply ISAS concepts and requirements appropriately.

Uncertainty and Inconsistency in Applying Shall, Should and May. In the ISAS, SASB defines the terms *shall*, *should* and *may*. *Shall*, as ''used throughout this Standard,'' means ''those elements that reflect SASB's mandatory disclosure requirements.''[36] *Should* and *may* are both defined as ''used to evaluate guidance, which, although not mandatory, provides a recommended means of disclosure.''[37] ISAS does not state why the terms *should* and *may* are defined identically. In certain places among the five sustainability topics discussed, *should* is employed; whereas, in other places, *may* is employed without further explanation. If those two terms are intended to mean the same thing, it is not clear why *may* ever appears. If those two terms are used with different meanings, they should have been defined and the differences should have been clarified. Instead, *should* and *may* are presented as synonyms.

The Description of Systemic Risk Management states that companies in non-traditional activities ''should enhance'' (not mandatory) disclosures of key aspects of Systemic Risk Management. By contrast, every related Accounting Metric states that the related disclosure ''*shall*'' (mandatory) be made. SASB does not explain why it uses ''should'' in the Description of Systemic Risk Management but requires that specific Accounting Metrics disclosures ''shall'' be made. Both *shall* and *should* are defined terms used throughout ISAS. SASB does not explain its use of inconsistent terms to discuss disclosures.

In the Description of Policies to Incentivize Responsible Behavior, ISAS states that registrants, ''*should* disclose products that incentivize responsible behavior and a low-carbon economy.'' In the related Accounting Metrics, SASB states that disclosures ''*shall* include . . . products that incentivize . . . environmentally responsible actions or behaviors.''[38] In this instance, the Description and the related Accounting Metrics use virtually identical language when characterizing the substance of the disclosures proposed, but the Description says disclosure ''*should*'' be made; whereas, the Accounting Metrics state that disclosures ''*shall*'' be made. No explanation is provided about why the Description and Accounting Metrics differ only in their respective use of the terms *should* and *shall*. The SASB never uses the term *must* to identify whether or not disclosures are required.

In the Accounting Metrics Section of Integration of Environmental, Social and Governance Risk Factors in Investment Management, ISAS states that each company ''shall'' describe how it assesses and identifies investment risks presented by four named ESG factors. ISAS then defines those four factors, asserting that each ''*should* be understood to include, but not to be limited to . . .'' ISAS does not explain the significance of its use of *should* rather than *shall*. The shifting use of this terminology is particularly important because each of the two words is a term defined in ISAS.

'Protecting Shareholder Value' or 'Enhancing Shareholder Value.' As noted previously, three of the five ISAS ESG topics propose actions by management to ''protect shareholder value'' or to ''enhance shareholder value.'' SASB does not define either phrase. Readers and users of ISAS cannot determine whether those phrases are intended to have different meanings or whether they are synonyms. If they have different meanings, one cannot infer the significance of using phrases that have different meanings in three of the ISAS topics. If they are synonyms, one cannot infer why phrases that employ different words are used to mean the same thing. Moreover, ISAS does not disclose whether there is any significance in the omission of the undefined phrases in the other two ISAS topics.

Observations. SASB asserts that disclosures required by ISAS *may* be material at the individual insurance company level. Nevertheless, ISAS provides no reasoned analysis and explanation of how SASB determined and documented its conclusions that disclosures prescribed in the five ISAS topics may be material to reporting companies. ISAS also does not disclose any evidence that insurance companies have failed to adequately address one or more of the five ISAS topics.

In the five ISAS issues, without explaining the reasoning behind its conclusions, SASB consistently treats its judgment as more learned or experienced than the managements of insurance companies that are required to accept the language of ISAS as correct in all respects.

[36] *Id.* at 7.
[37] *Id.*

[38] *Id.* at 14.

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Furthermore, ISAS requires specified disclosures on subjects in which the SEC and the FASB are the recognized authorities. There is no evidence that SASB has considered that its positions may impinge upon applicable pronouncements of the SEC and/or FASB.

Throughout ISAS, SASB employs numerous terms with special intended meanings without disclosing their definitions. ISAS then proceeds to use those terms assuming, incorrectly, that they are readily known and understood. ISAS also employs certain terms that appear to be used as synonyms; however, if the terms are not synonyms, ISAS does not explain the significance of the distinctions in meanings. Further, ISAS assigns apparently inconsistent meanings to certain terms that it may have intended to use as synonyms. Reasonable experienced individuals who attempt to employ and conform to the requirements of ISAS will not be able to do so and/or will apply ISAS inconsistently both at the individual company level and when compared to application of ISAS by peers.

The Descriptions and so-called Accounting Metrics in ISAS present conclusions SASB has reached about required disclosures. ISAS does not discuss the bases for SASB's conclusions or its reasoning in reaching its conclusions about proposed insurance company disclosures. A standard should be based on an analysis of information that clearly supports the conclusions reached. When evaluated together with other numerous shortcomings of ISAS, including the shocking assumption that SASB knows more about insurance company management than actual insurance company managers, SASB's preemption of the SEC and FASB prerogatives and SASB's dereliction in defining and using terminology on a consistent, reasoned basis, the failures of ISAS create insuperable uncertainty in its application and render it inoperable.