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RECEIVED
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OFFICE OF THE SECRETARY

Mr. Brent J Fields
Secretary
U.S. Securities and Exchange Commission
100 F St, NE
Washington DC 20549

Re: Concept Release on Business and Financial Disclosure Required by Regulation S-K; CFR Parts 210, 229, 232, 239, 240 and 249; Release Nos. 33-10064, 34-77599: File No. S7-06-16; RIN3235-AL78

Dear Mr. Fields,

I appreciate the opportunity to comment on the SEC's Concept Release. I do so to present my personal views with respect to Part IV F of the Release regarding Disclosure of Information Relating to Public Policy and Sustainability Matters.

My perspectives arise from forty years of participation in the corporate governance and sustainability communities, including focal interests in financial reporting as:

- A director of The Institute for Management Development (Lausanne) and Advisor to the IMD Curriculum on Corporate Lifespace (1984-1993)
- Head of the World Economic Forum "Corporate Performance" Program (2002-2004)
- Co-Founding Director of the Climate Disclosure Standards Board (London) in 2005.
- Primary employments as General Counsel of Deloitte (Touche Ross) for 23 years and as Chief Strategy Officer of Swiss Re for a decade.
- Participation in The Treasury Department's Advisory Committee on the Audit Profession (ACAP) (2005-2007), membership on the PCAOB's Standing Advisory Committee (2010-present) and Emeritus Chair of the US Chamber's Center for Capital Markets competitiveness (2007-present).

I will address ESG matters generally, with particular attention to the positions of the Sustainability Accounting Standards Board (SASB) as presented in its comment letter to the SEC of July 1, 2016.

PART I. OVERVIEW

The Concept Release notes the rising levels of advocacy in recent years for the inclusion of ESG data in financial reports required by the US Securities Laws. One key issue pervades all the questions posed in the Release and is central to the unusual requests of the SASB: Have social or commercial conditions changed since current SEC perspectives were set in 1975 and codified in 2010 to such a degree that those postures should be reconsidered?

In my view:

- **The rules codified in 2010 are appropriate to all current and foreseeable public policy and sustainability conditions. There is no need for new or amended disclosure requirements.**

- **The actions urged upon the SEC by the SASB and like minded others seek vast new reporting requirements as a means of imposing change in corporate responsibilities and business practices. Neither the disclosure objectives nor the substantive changes are in the best interests of shareholders or investors.**

- **To the extent that sustainability concerns warrant (1) consideration of changes in public policy, (2) changes in national priorities, or (3) the expansion of SEC responsibilities beyond implementation of the existing securities laws, those changes should be enacted through the front door of legislation and not through the back door of financial reporting regulation.**

- **The SAB has made no attempt to seek changes in established state laws on corporate governance or in the reporting and disclosure requirements of the Federal securities laws, presumably because it is aware that there is insufficient support to revise public policy in accordance with its principles.**

PART II. THE EVOLUTION OF THE SUSTAINABILITY DIALOGUE

The ESG movement is of very recent origin, but is instructive about the choices available to the SEC. Sustainability was not a part of the dialogues of the day in 1975. Climate risk was not then a noted concern and the sustainability movement as a culture and mission did not exist 40 years ago.

The cause du jour of the time was corporate governance. The 1970's were the early days of recognizing and reforming the old boys club of public company boards of directors. As such, the focus of the time was on state corporate governance laws. The SEC was absorbed in applying the Federal securities laws to cope with a wave of securities fraud, and was not deemed to have a role in setting public policy. "Stakeholder" was not an active word in either corporate governance or the enforcement of reporting and disclosure responsibilities.

By the mid 1990's, however, the two streams of activities had begun to converge. The Rio Earth Summit of 1992 had raised the profile of climate change, and corporate governance reformers were ready for an expanded agenda. Early manifestations of the intertwined governance and sustainability communities included corporate social responsibility initiatives and the issuance of annual corporate climate change reports, both launched in the Swiss insurance sector. Parallel attention in the academic community focused on "corporate life space" but soon morphed into stakeholder advocacy riding the wave of climate change concerns.

Institutions were born from these developments.

- In the late 1990s, CERES rose to prominence in the US, the Global Reporting Initiative (GRI) was born in The Netherlands and the Climate Disclosure Standards Board (CDSB) emerged out of the World Economic Forum. The climate Disclosure Project of the UK, absorbed the CDSB and gained stature as a multinational voice. A shared objective of these organizations was structured and consistent climate risk reporting by major companies, as a voluntary act of good corporate citizenship.

- A counter movement seeking mandatory climate disclosure requirements quickly followed, led by the UN. Its Principles for Responsible Investing (PRI) were launched in 2006 for the banking industry, followed by the Principles for Sustainable Insurance (PSI) in 2006 that targeted insurers.. Both were and remain committed to pressing for legally mandated disclosure standards, not surprisingly with enforcement to be in the hands of global governance. Again, concern about climate change was the prime motivator.

- The UN model of climate driven global governance was not to everyone's taste, however. "Integrated Reporting" emerged with the formation of the International Integrated Reporting Council (IIRC) in 2010 in the UK and the formation of the SASB the following year in the US. Both sought to develop sustainability disclosure standards in the private sector that were intended to be enforced by national regulators.

The IIRC and the SASB had a great deal in common at the outset, including much shared parenting as well as overlapping financial and academic support. Both espoused the broad ESG principles that had been formally introduced by the UN rather than trading only on the back of climate risk. Both undertook the development of disclosure standards and measurements. Both sought a multinational following. Both declared materiality to be an essential ingredient in standard setting and enforcement. And both espoused the use of Anglo Saxon principles of liability law as a primary tool of disclosure enforcement.

Divergences emerged quickly, however. By the time SASB issued its first Conceptual Framework document in 2013:

- IIRC had entered into a Memorandum of Understanding with the IASB regarding the objectives of sustainability disclosure, while SASB is understood to have unsuccessfully sought a similar understanding with the SEC.

- IIRC had adopted the IASB materiality test of information that "could" ,make a difference to the reasonable investor, while SASB had adopted the "would" make a difference test established for the US securities laws by the US Supreme Court in TSC v Northway.

- The IIRC was moving forward with a principles based approach to disclosure, while SASB was developing a more detailed rules oriented approach.

- IIRC continued to espouse a voluntary reporting regime, while SASB asserted that only a mandatory system enforceable under US securities law would suffice to impose behavior change on US public companies.

PART III. NEEDED CLARIFICATIONS OF THE SASB MANIFESTO

The SASB promotes its standards as if climate risk is the primary topic. In fact, the standards have virtually unlimited scope and consequences. It claims to apply the standards in accordance with materiality as measured in US law, but it does not do so consistently. It claims that the standards are entirely voluntary, but that is not the SASB intent.

1. The Scope of ESG Concerns

The SASB comment letter uses the terms "Sustainability", "ESG and "climate risk" frequently and interchangeably. They are not interchangeable.

- "ESG" (Environmental, Social and Governance) has great elasticity and an absence of specificity. It is a term created by the UN and made popular in its promotion of PRI and PSI, explaining that it must be open ended to accommodate emerging needs , and must also be undefined to assure that all worthy ideas can be fully embraced. ESG thus stands for whatever the UN wishes it to, including all eight of the UN Development Goals of which one is to "Ensure Environmental Sustainability." The SASB has made no attempt to limit the scope of its ESG agenda.

- "Climate Risk" (aka climate change) by contrast is very specific, referring to the fear of climate consequences due to carbon accumulations in the atmosphere. As discussed in The Paris Agreement of the Community of the Parties (COP 21), climate risk is deemed to be of such urgency that conflicting considerations should be disregarded.

- "Sustainability" has become a general purpose term, sometimes used to make climate risk more generic, and on other occasions to make ESG seem more understandable. It is the term SASB primarily relies upon in its comment letter when referring to climate change. Elsewhere in its recent literature, the SASB identifies "THE SASB UNIVERSE OF SUSTAINABILITY ISSUES". ("The Next Frontier in Sustainability" by Jean Rogers in the June 1, 2016 issue of Strategic Finance Magazine.) Twenty nine topics are listed, of which six might in some way deal with climate matters. Other topics include things as remote from climate risk as:

  Human Rights and Community Relations
  Data Security and Customer Privacy
  Labor Relations and Fair Labor Practices
  Compensation and Benefits

The SEC is free to consider the SASB requests narrowly if it wishes. But I urge awareness that to it's the SASB and allies sustainability is a holistic mission, any part of which is a Genie that once loose will not be easily put back in the bottle.

2. <u>The Flexibility of Materiality</u>

The SEC is rightly views materiality to be an essential ingredient in any scheme of disclosure, including the need for consistency of application of the term across all sustainability topics and comparable subjects. The SASB standards do not apply such disciplines.

The SASB claims to follow the Northway standard that deems sustainability information is material if there is a substantial likelihood that it "would be viewed by the reasonable investor as significantly altering the total mix" of available information. That is the theory. But when it comes to explaining and applying its standards, the SASB shifts to other descriptions. In its Conceptual Framework Draft of April 16, 2016, the Board declares sustainability information to be material if it is "reasonably likely to be material." (At page 7) That is a considerably different and more inclusive formulation, borrowing "reasonable" from its role in defining the relevant investor and applying it instead to broaden the range of what is treated as material. It is a substitution of phrase that also intentionally omits several important qualifying words from the Northway language.

SASB gives its standards yet another troublesome layer of flexibility. Citing the Commission's requirements regarding forward looking statements, the Board declares that sustainability information is material if it identifies "known trends, events and uncertainties that are reasonably likely to have material impacts on companies in an industry." (SASB Conceptual Framework, page 7) From this conflation of financial reporting standards with forward looking information, the SASB takes the large step of declaring that sustainability information is material if it "can or do(es) affect results of operations and financial conditions..." (Conceptual Framework, page 13)

The SASB is not lacking in financial reporting and securities regulation expertise. It seems unlikely that MD&A and risk factor disclosure standards have been accidentally confused with those applicable to financial statements. It is hard to imagine what kind of information, sustainability related or otherwise, would fail to qualify as something that "could affect" future operations or conditions. Under SASB standards, sustainability information is untethered from the materiality requirements of the securities laws.

3. <u>The Pretense of Voluntary Reporting</u>

The SASB says, as a routine disclaimer, that its standards are not authoritative, and that their use by US public companies is entirely voluntary. Beyond the boilerplate, however, the SASB speaks as if it is a fully fledged and empowered regulator, and presents its standards as if they are mandatory, or at least ought reasonably to be treated that way.

The organization's clear intention and purpose is to become authoritative, as its request for the SEC's benediction demonstrates. Until such time as that might occur the Board behaves as if it holds the policy high ground that will apply moral suasion as an alternative form of mandate. The SASB seeks to buttress the appearance of authority by securing a blue ribbon coterie of former regulators and financial community leaders for service on its board.

The sustainability reporting processes developed by GRI and by the IIRC are truly voluntary, and depend on demonstrations of their merit to influence corporate behavior. The SASB has taken the different route of seeking to impose new and substantially different public policy mandates on business models and corporate responsibility by claiming or obtaining a share of the SEC's regulatory power.

PART IV. THE SASB'S REQUESTS FOR SEC ACTION SHOULD BE DENIED

The SASB comment letter fundamentally asks two things of the SEC:

➤ **Acknowledgement that climate change and other sustainability matters, which were not material to public company financial statements in the past, have become so in recent years through intervening events and conditions.**

➤ **Designation that its standards are credible and can be used to by registrants to meet their sustainability reporting requirements.**

Neither request is supported by credible evidence and neither should be granted.

1. THE SEC'S CURRENT POSITION ON SUSTAINABILITY INFORMATION IS SOUND

The SASB challenges the suitability and legitimacy of the Commission's election to treat sustainability information as it does all aspects of financial reporting, requiring disclosure when material:

> "Overwhelming evidence confirms that, in the past four decades, investors have come to recognize that sustainability information is material and to demand disclosure of the same." (SASB comment letter, page 3)

That statement and the many similar ones throughout SASB publications is key to understanding the SASB position. It is a dual declaration: That sustainability information is clearly material, and that investors recognize the materiality. It is also a declaration that sustainability information became intrinsically material over the course of time. The SASB and its allied interests regularly declare that the only reasons mandatory reporting of sustainability information is not currently required are (1) that the SEC has not kept pace with the times and (2) that until now there has not been a mechanism for facilitating such reporting.

The Board does not appear to be troubled by the implications of its position, though it shies away from acknowledging them. If the SASB position is correct:

➤ Hundreds, more likely thousands, of registrant financial statements filed with the SEC in recent years have been materially misleading.

➤ Since at least 2013 when the SASB first put forward its view, the SEC has knowingly and willfully condoned securities fraud in relation to sustainability information.

Indigestible consequences are not, in themselves, justification for perpetuating an error, whether by an auditor who discovers an ongoing fraud or by a regulator that is said to be out of touch with reality. But in fact, the SEC has correctly declared that sustainability information, when material under the securities laws, must be disclosed. The Commission has no reason to change its position, and should not do so since that would cause injury to registrants, to the economy and to itself.

The SASB attempts to justify its demands by citing a multitude of surveys and opinions said to be definitive proof that sustainability behaviors are already established among registrants and investors as a de facto change. Yet those materials deal solely with attitudes and sensibilities. None reflect the behaviors of investors or registrants when decisions of substance are at stake. Consider:

- No US public companies (to the best of my knowledge) has thus far declared sustainability information to be material in financial reports filed with the SEC.

- There is no known instance in which any US public company has been accused in criminal, regulatory or civil law proceedings of material misrepresentation for failing to do so. The absence of such actions speaks louder than the recent and unpromising political ploy of a few state Attorneys General.

- Sustainability advocates have actively sought to use shareholder proxy rights as a means of compelling sustainability disclosure. The effort has been intense and coordinated for the past four proxy seasons. But while sustainability issues have been the most frequent subject of proxy initiatives, none of note has achieved shareholder approval, and in 2015 and 2016 the level of shareholder support has been declining. Corporate governance proxy initiatives have gained momentum, while sustainability initiatives do not.

- The SASB and its allies frequently refer to surveys and statements by institutional investors declaring their intentions to divest energy holdings from their portfolios due to the undisclosed climate risks. Here, too, there is great distance between statements of position and meaningful behaviors. CALpers, a close associate of SASB, declares that the extractive industries are hiding undisclosed climate risks in a manner harmful to investors. Yet at June 30, 2012, CALpers held 21,176,730 shares of Exxon Mobile and Chevron, worth $1.777 billion. By June 30, 2015 (the latest available information) CALpers had divested less than 0.01% of the shares, which by then had appreciated in value.

The business community speaks of its sympathy with sustainability concerns, genuinely and to compete effectively in NGO influenced markets for revenue and talent . But the business community demonstrates by its actions that it does not view sustainability issues to be material under present circumstances. By their actions, shareholders and investors also demonstrate that climate risk and other aspects of sustainability are not material to them. There is no basis for the Commission to reexamine the issue.

2. THE SEC'S AUTHORITY SHOULD NOT BE OUTSOURCED TO THE SASB

It hardly needs saying that the SEC may not delegate or deputize its responsibilities to those outside its direct control. Yet that is precisely what SASB asks—to be blessed as credible and to become an assessor of sustainability reporting without recourse to the SEC or any form of accountability.

The request is too clearly out of bounds to be deemed seriously made. The circumstances suggest that the Board's real purpose here is to capitalize on the Commission's Concept Release, permitting it to claim that its good faith request the SEC's for proper attention to sustainability matters was rejected. It will be important that the manner in which the Commission deals with Part IV F be expressed with tactical as well as substantive care.

PART V CONCLUDING OBSERVATIONS

The SASB presses for a new national compact regarding the role of business, urging dramatic changes to business responsibilities, stewardship obligations and required practices. I cannot recall an event in my professional lifetime with such breathtaking scope and consequence, with the possible exception of Congressional declarations of war. With a blue ribbon Board of Directors and eminent advisors, it cannot be assumed that the SASB is unaware that the requests contained in its comment letter to the Commission are wholly unprecedented.

The SASB Board asks for blanket endorsement by the SEC of hundreds of pages quantitative and qualitative reporting requirements, which have been developed in the past three years and is described as "market standards", as though that alone certifies their soundness and legitimacy. I suggest that what has been disclosed by the Board about its standards development practices demonstrates just the contrary:

- **The act of development was initiated and completed without any form of authority...**
- **It was conducted by many highly motivated people who, by and large, acted as individuals without the imprimatur of the organizations that employ them...**
- **Using techniques that were neither approved by anyone in positions of policy authority, nor tested for suitability either before or after their adoption.**

The SEC need not approve or disapprove of the merits of the ESG movement or the legitimacy of sustainability concerns in declining to endorse the SASB standards or in declining to deputize the SASB. It need only:

- **Recognize that no legislative, judicial or commercial events or conditions have shown a deficiency in the Commission's current standards,**

- **Note that the ESG movement includes several standard setting bodies sharing objectives with the SASB but promoting truly voluntary means of pursuing them,**

- **Note that SASB asks the SEC to act in ways that shareholders of US public companies have consistently declined to do,**

- **Declare that Congress and state legislative bodies are the proper targets of proposals to revise our social order, and**

- **Note that the SEC lacks the competence as well as the authority to carry sustainability issues any farther into financial reporting regulation than it has already done.**

I am grateful for the opportunity to make these comments and hope they are of some assistance.

Respectfully,

Richard H. Murray

cc: Chair Mary Jo White
Commissioner Kara Stein
Commissioner Michael J. Piwowar

Keith Higgins, Director of Corporate Finance