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Guardians of Truth: Ensuring Accuracy of ESG Information

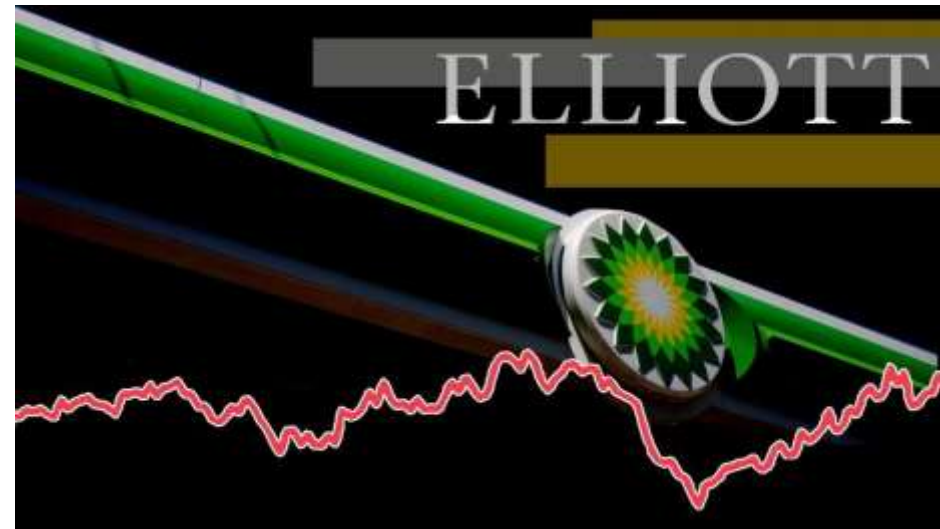
Commentary
Jennifer Hill



Introduction - What does this paper tell us?

Key themes:-

- Why ESG disclosure is important
- Why it matters that ESG disclosure be accurate
- The role of law and legal regulation in ensuring accuracy of ESG disclosure
- Challenges for legal regulation of ESG misstatements + potential regulatory mismatch
- Comparative focus Japan, US and EU.
- ESG-washing *cf* Trump + Elliott Management & BP



Central Research Question of the Paper and its Determinants

‘How can public and private enforcement mechanisms, along with *ex ante* and *ex post* approaches, be effectively structured to ensure the accuracy of ESG disclosures while balancing the interests of investors, stakeholders, and society under the double materiality principle?’

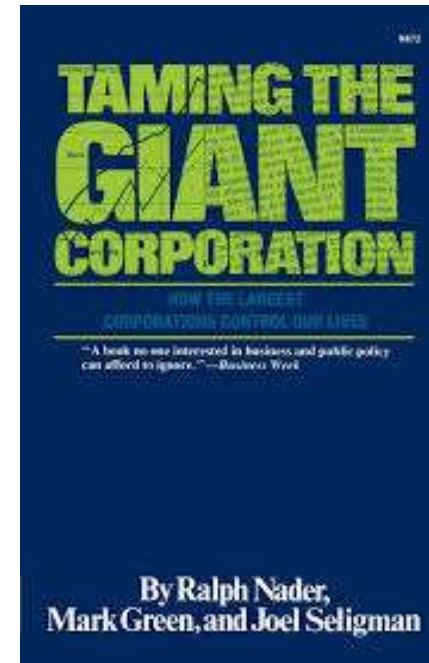
Determinants	Jurisdictional enforcement
Public/private	Japan - public/ex post
<i>Ex ante/ex post</i> regulation	US – private/ex post
Regulator’s expertise	EU – ex ante regulation (eg CSRD)

Some Comments and Suggestions

1. History and Evolution of ESG Disclosure (p 3)
2. Government Policies and Regulatory Developments (p 8)
3. Key Mechanism (for ensuring accuracy of ESG information) (p 13ff)
4. *Ex-ante* and Private-led Enforcement: Third party Assurance (p 15ff)

1. History and Evolution of ESG Disclosure

- Corporate governance pendulum swings versus contemporaneous battles in corporate theory (eg Hill 2021; Cheffins 2023).
- Reference - OECD Guidelines for Multinational Enterprises (1976).
- 1976 was a very big contemporaneous battle year!
- Eg Eisenberg, *The Structure of the Corporation* (1976) (directors as corporate monitors (eg of CSR (Brudney))
- Nader, Green & Seligman, *Taming the Giant Corporation* (1976) (pro-CSR)
- Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure* (1976) (market = ultimate taming agent)



THE STRUCTURE
OF THE
CORPORATION

A LEGAL ANALYSIS



Theory of the Firm: Managerial
Behavior, Agency Costs and
Ownership Structure
Jensen and Meckling, JFE, 1976
About 3400 citations

2. Government Policies and Regulatory Developments

- Tension /interplay between supra-national and national regulatory developments.
- ‘While international push for ESG disclosure has primarily been driven by the need to address investors’ short-termism, in Japan, ESG disclosure has been positioned as part of the country’s broader growth strategy’.
- Ie Japan often adopts international governance mechanisms, but for the opposite reason (eg Stewardship Code 2014) (Goto 2018)
- + growth of foreign institutional investors – impact re shareholder resolutions?



3. Key Mechanism (for ensuring accuracy of ESG information)

- Comparative nature of paper – see also Enriques, Gatti, Shapira, *How the EU's Sustainability Due Diligence Directive Could Reshape Corporate America* (2025).
- But this area is extremely volatile and dynamic in both the US and Europe! Eg proposed changes to Del GCL s 220 (Shapira, *Colum BSB*, 2025) + proposed watering down of EU sustainability rules (2025).

CULTURE WARS IN AMERICA

A Documentary and Reference Guide

Glenn H. Utter



INSIGHT

Omnibus Package proposed

key takeaways from the EU Commission's proposal to water down sustainability requirements for businesses.

Fieldfisher Belgium ESG

[Read the full article by clicking the link above](#)

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4. *Ex-ante* and Private-led Enforcement: Third Party Assurance

- ‘ESG information is predominantly qualitative, forward looking, **and subject to managerial discretion**’ (p 15) - perhaps differentiate between voluntary and mandatory disclosure re managerial discretion.
- Re third party assurance or certification – see Enriques, Romano & Tuch, *Green Gatekeepers* (2024) (identify limits of public enforcement and third party certifiers in identifying ESG-washing (eg lululemon 2024)).
- Potential conflicts of interest of certifying accounting firms – parallels primary interpretation of Enron and WorldCom collapses (Coffee 2004).
- Other types of private-led enforcement? Eg ‘say on climate’ resolutions and private engagement eg Governance for Owners Japan (GOJ) (Becht et al, 2021).
- Final point – path dependency aspect of paper very important.