The Paradox of Environmental Investment Disclosures: *Why the market is an ineffective self-regulator when it comes to climate change*

As I set out to conduct research on the environmental investment disclosures currently required in different capital markets around the world, focusing my own research in particular on Hong Kong, I aimed to answer a fundamental question: can we trust the market to respond to a problem that was also created by the market?

In our current economic system, companies face a paradox. They must continually grow to fulfil their legal obligations to shareholders, maintain favorability with investors, and earn profits. But making the choice to grow indefinitely also exacerbates our global climate crisis. Because governments were initially slow to act on remedying this paradox, the private sector had time to rise and fill the gap itself, defining corporate progress on climate change on its own terms.

This has resulted in the growing corporate movement towards publishing Environmental, Social, and Governance (ESG) disclosures. The idea is that companies need to be more transparent on environmental metrics such as the company's carbon emissions and use of natural resources, often alongside other metrics such as gender parity in the workplace. This movement has developed both through the initiative of the private sector, and through heavily private sector-influenced international organizations such as the Task Force on Climate-Related Financial Disclosures (TCFD), chaired by Michael Bloomberg. Currently, the TCFD is the major influencer of environmental investment disclosure regimes worldwide—despite the fact that its ideas are put forth by higher-ups in the very businesses it intends to regulate.

The TCFD has set forth certain standards for ESG disclosure, which many governments have adopted, and there is a growing pressure for companies to comply even if they are not required to by their governments. But it is important to note that these standards are not about reducing environmental impact; they are merely a requirement to *disclose* the relevant information, with no consequences one way or another based on the volume of one's emissions or resource use. And governments have failed to take a firm stance on requiring even this basic level of transparency. Of the six investment disclosure regimes our prong studied, none have implemented regimes that are fully mandatory. For example, though Hong Kong has taken a relatively firm stance, technically mandating that a report be released at the end of each fiscal year, one must only report on metrics that are "material" to the issuer's business. This "immateriality" loophole is one of the policies recommended by the TCFD.

Governments discuss and negotiate the specific details of these policies, debating questions like, how must businesses format their disclosure reports? What particular metrics must be reported? How can this information be easily disseminated to boards of directors in a way that does not infringe upon the varied remainder of their duties? But it is possible that these debates merely offer a peaceful distraction from the real issues. The real questions are things much more frightening, like which countries are at risk of sinking into the ocean this year, and can we do anything to stop it?

We spend so much of our law school education driving home the ideas of checks and balances and separation of powers. Yet in the modern capitalist era, we often throw those ideas out the window when it comes to markets. We expect that the market will always provide faster and more innovative solutions than what Congress could, and “regulation” has become a disfavored word. But there is a reason our government branches are held to strict, narrow limits for what powers they can and cannot exercise. We understand why we cannot ask the president to constrain himself. Why do we entertain that corporations are the best source of ideas for constraining corporate contribution to climate change? In the current system, it is corporations who have most strongly influenced governments’ requirements on environmental disclosures, meaning there is effectively no external regulatory system. Without this, companies may as well be completely unrestrained.

The corporate movement towards disclosure may create the illusion of progress, but transparency is a symbolic benchmark, doing nothing to stem the massive threat of climate change. Even U.S. government agencies are beginning to recognize that much more must be done, and quickly, to make impactful progress. For example, the U.S. Commodity Futures Trading Commission’s recent report *Managing Risk in the U.S. Financial System* states, “financial markets will only be able to channel resources efficiently to activities that reduce greenhouse gas emissions if an economy-wide price on carbon is in place at a level that reflects the true social cost of those emissions.” The CFTC, recognizing that the vastness of such a program is outside the window of its own limited powers, then calls upon Congress to act.

Given that this is where a major U.S. regulatory agency now stands, I believe environmental activists should bypass the disclosure issue and head straight for advocating for broader environmentally-focused economic policies, such as a carbon tax. This is something that will require companies to concretely curtail their environment-harming activities. As it stands now, the ESG disclosure regime is merely a window dressing, a policy with the air of progress but none of its teeth. We cannot rely on companies to curtail their own growth, given that this is contrary to their very nature; we cannot expect that they will all report on themselves transparently when easy loopholes are available and legal consequences are nonexistent. Stronger regulation by governments is the only way the negative environmental effects of companies can be reduced significantly enough to protect the planet.