



## **10 Intriguing Things You Need to Know**

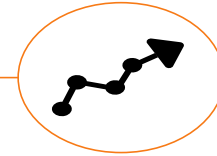
### **1. Human Capital Disclosures: What to Do Now**

In this [blockbuster Vid-Guide](#), WilmerHale’s Meredith Cross, Ropes & Gray’s Keith Higgins and Hogan Lovells’ Alan Dye share practice pointers about the hottest disclosure topics out there right now. Here are some of the tips imparted about human capital disclosures:

- Meredith suggests that you don’t obsess over the surveys of what is being disclosed in early filings – rather focus on the goal of the new “principles-based” requirement & your own circumstances.
- Make an effort to enhance your disclosures (ie. don’t merely disclose how many employees you have like you’ve done in the past).
- Be careful about merely cross-referencing to other sources of information you have out there. That doesn’t count in terms of meeting the new regulatory requirement if the important information isn’t in your 10-K itself.
- Keith notes this disclosure is tricky because of the various stakeholders that will be interested in this disclosure. It’s broader than just your shareholders – and you don’t want different messages in different documents.
- At the 7:11 mark, Alan talks about “materiality” – and that will help guide what gets disclosed in the 10-K vs. the proxy vs. a ESG report (which we also covered it Point #2

in our [January 2021 issue](#) of “The Five”). And in some cases, something might get disclosed in all 3 documents.

- Meredith talks about the potential difficulties of breaking down this disclosure by business “segments.”

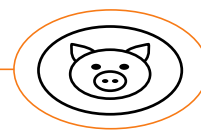


## **2. D&I Disclosure: The Power of Private Ordering**

In this [blockbuster Vid-Guide](#), WilmerHale’s Meredith Cross, Ropes & Gray’s Keith Higgins and Hogan Lovells’ Alan Dye share practice pointers about the hottest disclosure topics out there right now. Here are some of the tips imparted about D&I disclosures:

- The SEC disclosure requirements are pretty minimal – but shareholders & stakeholders are demanding more.
- Private ordering is fostering a race to the top. Companies need to heed the call & listen to their stakeholders. Otherwise, you are likely to get a shareholder proposal & perhaps other unwanted attention.
- When it comes to board diversity in the proxy, companies are experimenting with different formats in presenting the disclosure.

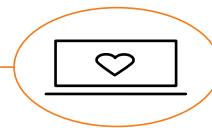
There are separate panels during the “Proxy Season Spectacular” that delve into each of these topics more deeply. Here is [our brochure with a list of the 30 panels](#) for this event – and here’s the [page with links to all of the panels for this conference](#). Available on-demand right now – for free.



### **3. Covid-Disclosures: Impact on Proxies, Etc.**

In this [blockbuster Vid-Guide](#), WilmerHale’s Meredith Cross, Ropes & Gray’s Keith Higgins and Hogan Lovells’ Alan Dye share practice pointers about the hottest disclosure topics out there right now. Here are some of the tips imparted about Covid-related disclosures:

- Proxies might address how Covid is impacting the health & safety of the workforce.
- Companies might still be adjusting how frequently they provide earnings guidance (or guidance with non-GAAP measures or other KPIs) as the number of people receiving vaccinations grow and our world comes back to life.
- MD&A will continue to be a challenge. Think known trends & uncertainties.
- Take another look at every disclosure you make through the prism of Covid. Make sure you’re tailoring your disclosure to where your company is now. Particularly risk factors.
- A key area to watch is how proxies describe the decisions that compensation committees made – namely pay adjustments for Covid.



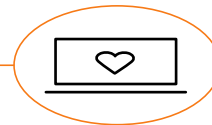
### **4. Risk Factors: Keep Assessing Them**

In this [blockbuster Vid-Guide](#), WilmerHale’s Meredith Cross, Ropes & Gray’s Keith Higgins and Hogan Lovells’ Alan Dye share practice pointers about the hottest disclosure topics out there right now. Here are some of the tips imparted about risk factors:

- Look hard if you’re disclosing something “may” have an impact – because if that factor is already “causing” an impact, the SEC may investigate whether your disclosure is accurate.
- Document when you make changes to your risk factors. That way, if you’re challenged as to whether you actively review (or tailor) your risk factors, you can specifically point

to those word changes you've made over the years. Even if you're merely changing a word or two to a risk factor, showing that you made a change proves that someone at least reviewed the risk factor.

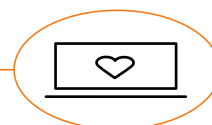
- It really is time to consider removing the generic risk factors. Those that don't have any real meaning. Or at least reduce their "wordiness." Although litigators will always tell you to leave the generic risk factors in.
- Some companies are taking their forward-looking statement's list of bullets – jazzing them up a little bit – and using that as their "risk factors summary" (if a company's risk factors exceed 15 pages in length, it's now required to include a summary of its risk factors).



## **5. MD&A: Get Ahead of the New Requirements?**

In this [blockbuster Vid-Guide](#), WilmerHale's Meredith Cross, Ropes & Gray's Keith Higgins and Hogan Lovells' Alan Dye share practice pointers about the hottest disclosure topics out there right now. Here are some of the tips imparted about the coming 'new-look' MD&A:

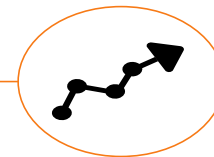
- Item 303 has been reorganized – the substantive changes aren't huge, but not insignificant. There is greater focus on 'analysis' – including the need to provide better guidance to investors as to what the future looks like.
- Why wouldn't you want to early adopt? You may be able to delete some of the tables (eg. 'selected financials,' 'supplementary data" and 'contractual obligations' table) that you've been required to include in MD&A. But for critical accounting estimates, removing a table may force companies to describe their sensitivity analysis – and companies tend to not want to do that.
- Companies might be too busy to early adopt – they don't have enough time to revamp their disclosure controls right now.



## **6. “Business” Section: A New Look?**

In this [blockbuster Vid-Guide](#), WilmerHale’s Meredith Cross, Ropes & Gray’s Keith Higgins and Hogan Lovells’ Alan Dye share practice pointers about the hottest disclosure topics out there right now. Here are some of the tips imparted about the new-look “Business” section of the Form 10-K:

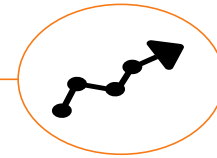
- Beyond “human capital management,” not much was changed by the SEC’s recent changes to Item 101 of S-K. So perhaps not much will change in your “business” section.
- You want to draft a “Business” section that fully describes your company – and then do a form check against S-K to make sure you’re not leaving anything out.
- Reconsider your disclosure controls & procedures – you may be able to dismiss some of your routine practices. Save yourself the hassle if its unnecessary.



## **7. “Perks” Disclosure: How to Avoid SEC Enforcement Interest**

In this [33-minute Vid-Guide](#), Gibson Dunn's Tom Kim and Davis Polk's Kyoko Takahashi Lin talk about perk disclosures and the SEC's recent Enforcement actions in the perks area, including the challenges of categorizing expenses – particularly “mixed purpose” ones - and steps you might consider to reduce the chances of being targeted by the SEC’s Enforcement Division.

At the 11:55 mark, Kyoko notes that you should ask yourself how your circumstances would look if they were reported in the Wall Street Journal – that’s an easier-to-implement standard than the sometimes-murky threshold in the SEC’s framework. And at the 12:45 mark, Kyoko discusses new technologies and home offices for executives – and Tom analyzes (at the 16:10 mark) the scenario when executives are invited to a charitable gala.



## **8. Proxy Disclosure: Bake In What Investors Ask For**

In this [52-minute Vid-Guide](#) about shareholder engagement - at the 31:17 mark - Prudential’s Peggy Foran talks about how you might use the proxy as a tool in your shareholder engagement arsenal, including:

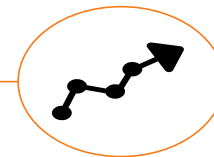
- Take what you’re learning from institutional investors - what they want to talk about - and address those topics in your proxy.
- Consider that input from investors almost like it’s akin to recommendations from your advisors & consultants.
- Provide that disclosure in a manner that enables investors to easily consume it (if that makes sense for the company).

### **How to Best Use Zippy Point**

Here's a [short video](#) explaining how to best use “Zippy Point.” There are more than 530 Vid-Guides dealing with corporate & securities law, corporate governance, E&S issues and more – see the list of Vid-Guides spread throughout eight categories:

- [Corporate Governance](#)
- [Proxy Season](#)
- [Executive Pay](#)
- ['34 Act/Other](#)
- ['33 Act/Deals](#)
- [Sustainability/E&S](#)
- [Career Advice](#)
- [Fun Party](#)

And since all the content on ZippyPoint.com is complimentary, please “[Pay-What-You-Can](#)” to help keep this fine platform alive & well...

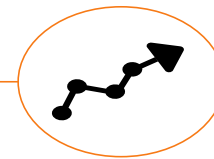


## **9. “Legal Proceedings” Section: Cross-Referencing the Financial’s “Contingency” Notes**

In this [blockbuster Vid-Guide](#), WilmerHale’s Meredith Cross, Ropes & Gray’s Keith Higgins and Hogan Lovells’ Alan Dye share practice pointers about the hottest disclosure topics out

there right now. Here are some of the tips imparted about the new look “Legal Proceedings” section of the Form 10-K:

- Many companies might not make changes to their “Legal Proceedings” section – it depends on a company’s industry & its own circumstances (ie. companies with environmental proceedings might have changes they want to make; at the 33:17 mark, the group discusses whether you might consider changing to the \$1 million threshold).
- For quite some time, a lot of companies have been cross-referencing to their financial statement “contingency” footnotes. Many don’t include the details elicited by Item 103 of S-K. Now that there is a codified way of making a cross-reference, it will be interesting to see if those companies change the way they cross-reference.
- The forward-looking safe harbor covers Item 103 disclosure in the 10-K – but the safe harbor doesn’t cover the financials. But not much disclosure elicited by Item 103 is forward-looking – so it might be more of a theoretical issue.



## **10. Virtual Annual Meetings: “Q&A Session” Proxy Disclosure Should Be Accurate**

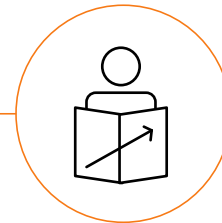
As discussed during several of the [Vid-Guides about virtual annual meetings](#), institutional investors – and proxy advisors – are keen to have companies be more transparent about what their practices will be this proxy season when it comes to their “Q&A sessions” for their annual meetings. Here’s a [33-minute vid-guide](#) with Doug Chia about how to handle these Q&A sessions.

And in this [33-minute Vid-Guide](#) about the legal aspects of virtual annual meetings, I note that whatever your Q&A practices might be, clear them first with your board chair, CEO and



anyone else who might be sensitive to what the company’s Q&A practices might be before describing them in the proxy.

You don’t want to disclose certain practices in the proxy only to have the board chair object – and change – those practices right before the meeting (and after the proxy is filed with the SEC & delivered to shareholders). The plaintiff’s bar is going through proxies these days with a fine-tooth comb to find inaccuracies, looking for an excuse to file a proxy disclosure lawsuit.



### **Inside Baseball...**

## **Parsing the SEC’s Form S-8 & Rule 701 Proposals**

In this [wide-ranging Vid-Guide](#), Compensia’s Mark Borges, Ropes & Gray’s Keith Higgins and Fenwick & West’s Scott Spector explain all you need to know about the SEC’s recent proposals to revise Form S-8 and Rule 701, including the new “temporary rule” for gig workers (aka “platform workers”).

For the proposed amendments to Rule 701, starting at the 24:54 mark, the crew gets into some of the more challenging aspects of the proposals, addressing these topics:

- Prospective application of \$10 million information delivery requirements
- The age of delivered financials (ie. the “180-day” rule)
- Delivering a Section 409A report in lieu of financials works
- RSU recipients and the “no-sale” theory

In the last 10 minutes, the panel delves into the “temporary rule” for gig workers – including how Scott initially coined the term “platform workers”!

## **Keen Observations...**

### **A Practical Reimagining of Director Searches to Reach D&I Goals**

My friend, **Nicole Sandford**, EVP & Global Board Services Leader at Ellig Group, a leading provider of diverse executive and C-suite talent, recently penned this practical piece:

Recent events have laid bare America's past failures in supporting equality in our diverse culture. Perhaps nowhere has change been more anticipated than in corporate boardrooms. Yet, in 2020, we still see incremental change rather than the kind of dramatic change many have called for. Clearly, there is room for improvement.

Since joining Ellig Group last year, I have talked with a broad spectrum of directors, executives, corporate secretaries, and board advisors. I've asked each to share previous corporate board search experiences with an eye towards enhancing the overall experience.

The response was near universal frustration with the approach taken by many executive search firms in the past. Further probing identified three persistent problems: 1) List Recycling; 2) Bait and Switch; and 3) Radio Silence. I'll cover each a little more.

**List Recycling**: Recycling is good for the environment. It is not a great strategy for a corporate board search. There is a prevailing perception that executive search firms recycle candidate lists of sitting directors and "50 most powerful..." lists. As a result of list recycling, searches do not routinely surface viable, unexpected prospects. By way of example:

- A corporate secretary reported receiving a nearly identical "long list" of candidates for two searches that were several years apart.
- One corporate board member was startled when a retained executive search firm didn't present any off-the-radar candidates, especially because he had personally referred "dozens" of such qualified candidates to that very executive search firm.
- A nominating and governance committee chair person told me that she had specifically included a request for first-time and nontraditional candidates in the search criteria. It took three separate efforts for the executive search firm to include first timers, and even then she found the candidates "disappointing."

**The Bait & Switch:** Another cause of frustration is the difference between the prospects and process described in the “pitch” versus what is actually presented for consideration once an executive search firm is selected. Two recent stories demonstrate the point:

- The nominating committee of a middle market industrial company selected an executive search firm based partially on their professed focus on diversity candidate identification. Later, the firm presented a slate with no women or people of color.

When pressed for an explanation, the company was told that there weren't any women or diverse candidates qualified to be on the board. Anywhere. In 2020. (Incidentally, the chair of the nominating and governance committee to whom the firm was presenting is female).

- An executive search firm presented a long list of prospects in its pitch to the company, implying relationships that turned out not to exist. When the time came to review the initial slate, all of the candidates from the proposal presentation were missing from the list.

Ultimately, the executive search firm said that the company shouldn't have had any expectations that they could have attracted candidates “of that caliber,” and that the names were meant to be “illustrative”.

**Radio Silence:** I heard variations of the following story from multiple directors:

- An executive search firm reaches out to a prospective corporate board member. He or she is told that a board is interested in their background for an opening. They are then asked to provide additional information, revise their board bio, check conflicts and review the corporate board calendar – all within a short timeframe.

Next, they join a series of calls with the executive search firm, and eventually they may or may not be interviewed by the company. If the firm becomes uninterested at any point in the process, they just stop communicating. Radio silence.

- One director told me that he had been through the entire process, including a meeting with the nominating chair. He found out he had not been selected when he saw a press release announcing the successful candidate. He was never given any feedback about the rationale and what, if anything, he could have done differently. He was baffled.

**Nicole's Takeaways:**

Here are six steps that collectively reimagine corporate boardroom searches to support diversity, equity & inclusion goals.

1. The first failure of the executive search process may be over-reliance on proxy data and “50 most powerful” lists. It takes time to build your own network of next generation candidates, and business acumen to align these candidates with the right corporate board fit. This is what is needed to make meaningful progress.
2. Executive search firms should invest in programs to get to know potential candidates (especially those that are referred/prequalified by CEOs or experienced corporate board members), and to include some of these and other first-time directors on every panel.
3. Executive search firms should create a unique slate for each search. A firm’s business model may make this challenging. The financial pressures of public ownership, volume-based targets, or historical treatment of corporate board placements as “loss leaders” for more lucrative work can make it difficult for some executive firms to invest the time to do this work properly.
4. Nominating committee chairpersons may want to consider more probing questions about how corporate board searches will be sourced and if fees reflect market rates. Lowball pricing and “the volume play” is how we got to where we are now, and boards have the power to change that approach.
5. Prospect lists will always include people that will not be interested in a particular corporate board for any number of reasons. But one has to wonder about the ethics of “pitching” prospects that are highly unlikely to be a fit, are over-boarded, or with whom the executive search firm has no existing relationship.
6. Regardless of who is presented, executive search firms must have the courage to bring feedback to candidates, and to maintain open and transparent communications throughout the process.

In this [40-minute Vid-Guide](#), Nicole joins KPMG Board Leadership Center’s Annalisa Barrett and Perkins Coie’s Allison Handy to get much more into the nitty gritty of board diversity. Some really good practice pointers are in there – check it out.

**We Love Zippy Point So Much (That It Hurts Inside)**

This [2-minute silly video](#) features a bunch of Broc’s friends saying ironic things about Zippy Point. It quickly became one of the more popular videos on the site. Check it out!

## **The Random...**

### **Zippy Point is Free? Um, What's the Hitch?**

One of my favorite moments in talking to folks about my plans to launch Zippy Point was when one friend abruptly stopped me when I explained the platform would be populated with instructional videos, available for free. He blurted out, “Free? What’s the hitch?”

I’d been so used to the notion that all the content was complimentary – dutifully plowing ahead for several months – that I hadn’t considered an answer to the question in some time. Frankly, I was at a loss for words, other than to softly say “there is no hitch.”

That’s because there is no hitch. My motivation for launching Zippy Point was to give back to the community. To educate the next generation. To keep our community united in tough times. To not price out those that can’t afford the alternatives that have become way too expensive in my humble opinion.

So maybe I’m a little bit crazy. That’s just who I am. So I’m putting my talents to use doing what I love best, what I know best. I’m passionate about this stuff. I love our community. And I’m too young to hang it up quite yet.

Of course, having said all that, I am relying on the generosity of the community to donate to the cause if they find my content of value. So I can buy health care for my family, so I can recoup my operational costs.

You’ll see my recommended levels of support on my [“Pay-What-You-Can” page](#) are a fraction of what other providers are charging. On Zippy Point, you should get all your programming needs met, you should be kept abreast of all the latest, you should get training in all those areas where you need some education.

And if you don’t see what you need, please do drop me a line: [broc@zippypoint.com](mailto:broc@zippypoint.com). Thank you for being a part of the community – and here’s [my 2-minute video](#) explaining this same concept...

For more proxy season guidance, check out our [January 2021 issue](#) of “The Five” newsletter, which covers these topics:

1. D&I Disclosure: Consider “Materiality”
2. Board Diversity Disclosure: Break Out to Show Gender & Racial/Ethnic Diversity Separately
3. Human Capital Management: Should Your Independent Auditor Get Involved?
4. Shareholder Engagement: It’s All E&S, All the Time
5. “Business” Disclosure: How Much Should You Change?
6. Stockholder Lists: Change D&O Addresses for Safety Reasons
7. ISS Research Reports: Don’t Forget to Ask for a Copy
8. How to Best Bake Covid Into Your MD&A & Risk Factors
9. Risk Factors: Drafting the Two-Page Summary
10. Virtual Annual Meetings: Handling the “Q&A Session” Properly (10 tips on this topic available)
11. “Legal Proceedings” Disclosure: Whether to Choose a Higher Disclosure Threshold for Environmental Proceedings?

In the [“Annual Meetings” section](#) of our “Vid-Guides” Portal, we have a number of Vid-Guides dealing specifically with issues raised by virtual shareholder meetings, including:

- [Virtual Shareholder Meetings: How to Handle Q&A Sessions](#)
- [Virtual Shareholder Meetings: The Legal Aspects](#)
- [Virtual Shareholder Meetings: Broadridge’s View](#)
- [Virtual Shareholder Meetings: In the Trenches](#)
- [10 Groovy Things to Disclose About Virtual Annual Meetings in Your Proxy](#)

You might want to check out this [34-minute Vid-Guide](#) where Soundboard Governance’s Doug Chia & I discuss how to handle the Q&A session at length. We analyze the 18 recommendations from the recently-released [“2020 Multi-Stakeholder Working Group on Practices for Virtual Shareholder Meetings”](#) and more.