



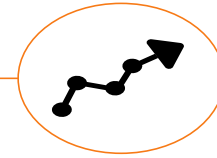
10 Intriguing Things You Need to Know

1. Meredith, Keith & Alan Talk Disclosures: Hot Takes

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. There were so many pointers shared during this panel that it would fill several issues of this newsletter. So best to just watch and hear their pointers about:

- Human capital disclosures
- D&I disclosures
- Covid-related disclosures
- “Business” section
- “Legal proceedings” section
- Risk factors
- MD&A

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.

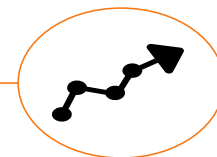


2. D&I Disclosure: Consider “Materiality”

We had a lot of fun during this [36-minute Vid-Guide](#) entitled “Yes, Diversity & Inclusion Disclosure” with Skadden Arps' Brian Breheny, Uber's Keir Gumbs, Vinson & Elkins' Sarah Fortt and Mayer Brown's Candace Jackson. We tackled a range of "D&I" disclosure topics but got to the heart of the matter in the waning minutes – starting at the 29:22 mark - when there was a healthy group discussion regarding “materiality.”

Be mindful to give investors what they want – which is a whole lot of D&I data points, as well as a full description of the company’s D&I strategy and story. But at the same time, be mindful to be accurate, be consistent – don’t cherry-pick data points only when those look favorable for the company. Otherwise, you might find yourself in the position where you’re getting sued for misleading disclosure - as some companies have already found themselves.

Among the many finer points made was Sarah’s beautiful illustration of this dilemma, consider a “layered” approach to materiality that distinguishes between “Little M” materiality (what is important to your company’s specific investors) – and “Big M” materiality (what is important to a “reasonable investor,” the threshold for liability under the federal securities laws).



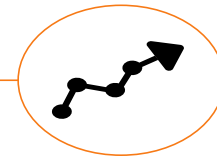
3. Board Diversity Disclosure: Break Out to Show Gender & Racial/Ethnic Diversity Separately

During the panel discussed in #2 above, Keir Gumbs mentioned that Uber was likely to include a “D&I board diversity matrix” in its proxy this year. There are plenty of companies that have already used graphics to illustrate their board diversity in their proxy - take a gander at this [3-](#)

[minute Vid-Guide](#) during which I wade through 10 examples. And look at the several dozen sample disclosures starting on page 121 in [DFin’s “Guide to Effective Proxies.”](#)

But the kicker is that you’ll now need to break out – separately – how diverse your board is both gender-wise and racially/ethnically. You can’t combine both of these two separate diverse considerations into a single diversity statistic in your proxy.

You need to do this so that ISS (and investors) can rely on publicly available information about your board diversity for each of these categories in order to apply its updated policy, as noted by ISS’ Pat McGurn at the 22:08 mark of this [35-minute Vid-Guide](#). This year, ISS will flag the boards in its reports that have no apparent racial or ethnic diversity – and then beginning in 2022, ISS will recommend against the nominating committee chair of such boards absent mitigating factors.

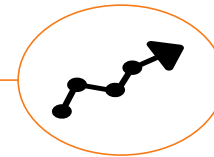


4. Human Capital Management: Should Your Independent Auditor Get Involved?

There are a wide variety of issues & topics raised for you to consider during this [38-minute Vid-Guide](#) about handling “human capital management” disclosure with Davis Polk’s Ning Chiu, Prudential’s Peggy Foran, Shearman & Sterling’s Gillian Emmett Moldowan and Cooley’s Amy Wood. Hot topics include what this disclosure might look like (we parse some recent 10-K disclosures; also see this [FW Cook memo](#)) – and the potential liability for the disclosures you do make.

At the 28:14 mark, Prudential’s Peggy Foran brought up a “food for thought” issue – whether your independent auditors should be hired to audit these non-financial measures. The auditors are trying to break into this business – and that might be pricey for you. It’s early in the game – and there are some practical issues involved, such as how would they go about auditing some measures which don’t lend themselves easily to an audit. It’s something you should bear in mind as you look beyond this proxy season as this topic matures.

This first issue of “The Five” covers the proxy season given the time of year. But Zippy Point is about much more than that – there are oodles of Vid-Guides about corporate governance, E&S, deals, career advice and more. Upcoming issues of “The Five” will provide practical guidance about all of these topics.



5. Shareholder Engagement: It's All E&S, All the Time

This [52-minute Vid-Guide](#) with Prudential's Peggy Foran, Uber's Keir Gumbs, PJT Camberview's Bob McCormick and Wachtell Lipton's Sabastian Niles is chock-full of practical guidance about shareholder engagement. At the 43:50 mark, the panel discusses how E&S and proxy season engagement are overlapping so much right now, including:

- This proxy season has been a turning point as investors want to discuss E&S issues much more than they have in the past – and historically there has not been much proxy disclosure about these topics.
- The interest in social issues in particular has dramatically risen. Investors are looking for real progress in areas that are social-related.
- Beyond the proxy, companies might consider posting what is essentially a “summary E&S report” on their corporate websites for investors to consider - since full E&S reports typically doesn't get posted until after the proxy season ends.

Another gem in that [52-minute Vid-Guide](#) - at the 31:17 mark – is when Prudential's Peggy Foran talks about how you might use the proxy as a tool in your shareholder engagement arsenal, including:

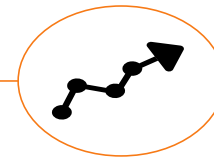
- Take what you're hearing from institutional investors - what they want to talk about - and address those topics in your proxy.
- Consider that input from investors like it's akin to recommendations from consultants.

- Provide that disclosure in a manner that enables investors to easily consume it (if that makes sense for the company).

This issue of “The Five” pulls from the “Proxy Season Spectacular” conference, which is available on-demand – for free – right now. Upcoming conferences (aka “Z-Events”) include:

- Doing Deals: Hot Takes
- E&S Disclosure Workshop
- In-House Institute
- Private & Smaller Company Workshop

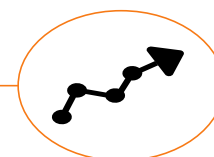
All of these Z-Events are free – and will be available on-demand. See our [“Z-Events” page](#).



6. “Business” Disclosure: How Much Should You Change?

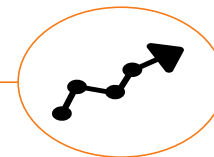
In this [28-minute Vid-Guide](#), Skadden Arps' Brian Breheny, Microsoft's Peter Kraus and American Express' David Kanarek - discuss how to approach the "Business" section for the Form 10-K (and 10-Q) given the recent regulation changes, including:

- How do you decide which disclosures to eliminate from the “Business” section? (Love the advice from David at the 6:49 mark about including proposed deletions in drafts sent to the working group – you might not realize that some folks in your company rely upon a public disclosure that you don’t think is meaningful)
- How might you enhance any disclosures about business strategy?
- What do you do now about your “governmental regulations” disclosure?
- How do you decide whether to keep older descriptions given that the 5-year lookback requirement has been removed?
- Might companies avail themselves of the option to link to previously-filed information rather than repeat it in a SEC filing?



7. Stockholder Lists: Change D&O Addresses for Safety Reasons

In this [33-minute Vid-Guide](#) entitled “Virtual Annual Meetings: The Legal Aspects,” at the 16:21 mark, Richard Layton’s Mark Gentile notes that that stockholder lists for virtual meetings are “more public” – given that they typically are posted for the virtual meeting (in comparison to being merely available for inspection at an in-person meeting). So companies may want to consider changing the addresses listed for directors & officers on their stockholders list – changing them from their home addresses to the company’s HQ address. That helps shield that personal information for safety reasons.



8. ISS Research Reports: Don’t Forget to Ask for a Copy

You’ll want to check out this [35-minute Vid-Guide](#) with ISS’ Pat McGurn to learn the nuances of all the policy updates that ISS made recently. Near the end of the Vid-Guide, starting at the 31:44 mark, Pat discusses how ISS will no longer enable S&P 500 companies to review a draft research report – and how you might want to input a contact from your company so that you receive a final copy of the research report relating to your company - so that you can conduct your own fact check then. ISS will make material factual corrections and notify their clients of such, even after a final report has been delivered to their clients.



9. How to Best Bake Covid Into Your MD&A & Risk Factors

In this [40-minute Vid-Guide](#), Gibson Dunn’s Tom Kim, Gunster’s Bob Lamm and Gibson Dunn’s Ron Mueller tackle the latest developments regarding Covid-related disclosures in SEC filings. At the 7:46 mark, the gang discusses how important it is to cover “known trends & uncertainties” - how Covid impacts your business, your liquidity & operations – in your MD&A. Getting into the “analysis” of it all. And at the 14:59 mark, the panel gets into how to update Covid-influenced risk factors.

There also is a healthy discussion about the use of voluntary 8-Ks as developments related to the pandemic move fast – and the last 10 minutes of the panel get into the optics of insider use of Rule 10b5-1 plans and how to best protect the reputations of your insiders that have these plans.



10. Risk Factors: Drafting the Two-Page Summary

In this [32-minute Vid-Guide](#), WilmerHale’s Lily Brown and American Express’ David Kanarek get into the nitty gritty of risk factors, covering the SEC’s new changes to Item 105 of Regulation S-K, discussing how to handle updating risk factors – and going through twenty “do’s” and “don’ts” when it comes to risk factors.

As a practice tip, for the two-page risk factor summary – something now required under Item 105 if the “risk factors” section is more than 15 pages in length - some companies may want to look to their traditional forward-looking statement as a starting point. Also consider

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 these categories:

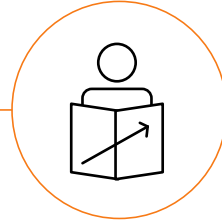
- [Corporate Governance](#)
- [Proxy Season](#)
- [Executive Pay](#)
- [’34 Act/Other](#)
- [’33 Act/Deals](#)
- [Sustainability/E&S](#)
- [Career Advice](#)
- [Fun Party](#)

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

the Form S-1’s “box summary” of risks that the Corp Fin Staff usually pushes for in IPO prospectuses.

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 Deep Dive...

Virtual Annual Meetings: Handling the “Q&A Session” Properly

A byproduct of the pandemic is that there is heightened attention being paid to annual shareholders meetings. The pandemic has forced companies to move their annual meetings online – and suddenly, institutional investors, the media & more are taking a hard look at how you are conducting your annual meeting.

Here are 10 things for you to be aware of as you prepare for this year’s virtual annual meeting:

1. **The Q&A Session is the Lightning Rod** – One of the main reasons that folks are tuning into your virtual annual meeting is to see how your directors & officers conduct themselves during the annual meeting. Do you bother to even introduce your directors? How do you treat shareholder proponents? And most importantly, how do you conduct your Q&A session?
2. **It’s All About “Tone at the Top”** – Why are folks tuning in? Because the conduct of your annual meeting is one of the few opportunities that shareholders have to get a somewhat candid peek into your company’s culture – at least the view from the top.

Knowing that, will the officers & directors who run your meeting be willing to adjust their annual meeting practices to show off their good side? If not, that certainly can be telling. That they know they are “on trial” – and yet they still behave as if they have something to hide, as if they can’t be bothered dealing with shareholders.

3. **Don’t Turn a Shareholder Into a Martyr** – Be aware that if your company treats a shareholder poorly during an annual meeting, that awkward situation can blow up fast. A tweet can start trending. Something that speaks to a reporter. What starts off as a “small thing” can quickly snowball into something quite serious reputation-wise. It can go viral.

4. **Yes, Your Largest Shareholders Are Watching** – Strange as it may sound, your largest shareholders who have never attended any of your in-person meetings may suddenly appear at your virtual annual meeting. It happened more often than you might think during 2020.

Ask your largest shareholders how they believe your meeting should be conducted. Why not make them happy? If they're attending a lot of meetings, they might have a window into what they consider "best practices."

5. **Yes, the Media Is Willing to Report About How Your Meeting Was Conducted** – The mass media was willing to write articles during 2020 about some annual meetings during which the hosts appeared to not take their meetings seriously – particularly their Q&A sessions.

6. **Don't Get Cute With Handling Questions** – When taking questions, don't get cute and cherry-pick to avoid the tough ones. The tough ones are what makes the process worthwhile. How does management handle a tough question? That's what shareholders want to know.

Good questions can come from anywhere. They might come from retail shareholders. In fact, retail shareholders might be more likely to ask a hard question in a public setting. Your largest shareholders might reserve their difficult queries for more private settings – or not ask them at all.

If you avoid a tough question, that's the sort of thing that may lead a shareholder to complain about more vociferously, that they might dig in their heels and create a bigger stink – and word might get around and start a drumbeat that something is amiss at your company more broadly.

7. **Answer Those E&S Questions** – During most of the shareholder engagements heading into the 2021 proxy season, the #1 topic – by far – were those related to E&S. Topics that might have been considered "soft stuff" and sidestepped during past annual meetings should not be brushed off anymore.

Your directors & officers should be prepared to address the seriousness of your sustainability efforts, your diversity & inclusion achievements and more. Listen to what institutional investors are asking about during engagement – and address those topics not only in your proxy, but during your annual meeting too.

8. **Be Transparent About How You'll Handle Q&A** – Shareholders – and proxy advisors – want transparency about how you'll handle your Q&A session. Address that in your "Rules

of Conduct” that should be posted on the webpage where your annual meeting will be available. Address that in your proxy.

Here is an excerpt from [Microsoft’s “Rules of Conduct”](#) from their recent meeting:

6. We welcome questions from shareholders. An opportunity will be provided to present questions and comments during the question and answer session, which will include questions submitted in advance, and submitted live during the Annual Meeting.

In order to give as many shareholders as possible the opportunity to ask questions, we ask that you please limit yourself to one question/topic. Up to one minute will be allocated to read each question.

a. Shareholders may submit a question in advance of the meeting at www.proxyvote.com after logging in with the 16-digit control number (“Control Number”). The Control Number is found next to the label for postal mail recipients or within the email you received with your Proxy Statement materials.

b. Live questions may be submitted online beginning shortly before the start of the Annual Meeting through www.virtualshareholdermeeting.com/MSFT20. Live questions will be taken in the order received.

c. A document will be posted on the Annual Meeting page of our Investor Relations website after the meeting that summarizes and answers the questions received. If multiple questions raise the same topic, we will provide representative examples. If a question violates these rules of conduct, it will not be summarized or answered.

7. Shareholders’ views, constructive comments, and criticisms are welcome, but the Board Chair will not address questions and stop discussions that are:

- a. irrelevant to the business of the Company;
- b. repetitious of statements made by other persons;
- c. derogatory references to individuals or that are otherwise in bad taste
- d. related to personal grievances; or
- e. a matter of individual concern that is not a matter of interest to shareholders generally

Additionally, the Chair will stop discussions relating to proposals that were not previously submitted properly under SEC Rule 14a-8 or in accordance with the Company’s advance notice Bylaw provisions.

9. **Don’t Overpromise How Your Q&A Will Be Handled** – Be careful not to claim that you’ll handle the Q&A session one particular way – but handle it differently in practice. That’s how you wind up getting sued. This type of divergence can be the basis for a proxy disclosure lawsuit. 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.

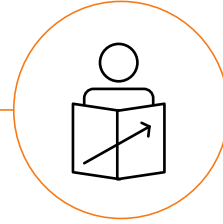
Clear in advance how you’ll handle Q&A with the board chair, lead director, senior officers and anyone else who has the authority to alter how the meeting is conducted. You don’t want to disclose certain practices in the proxy only to have the board chair object – and change – those practices right before the meeting.

10. **The Board Should Pay Attention** – This is an opportunity for the board to evaluate management in action. Do the directors like what they see in terms of management’s culture? Are they treating people with respect? Are they trying to hide the ball? If so, what is the board going to do about it?

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.



Keen Observations...

“Legal Proceedings” Disclosure: Whether to Choose a Higher Disclosure Threshold for Environmental Proceedings?

In this [27-minute Vid-Guide](#), Weil Gotshal’s Howard Dicker and Bryan Cave’s Vicki Westerhaus analyze the SEC’s recent changes to Item 103 of Regulation S-K, the “legal proceedings” disclosure for the Form 10-K and 10-Q.

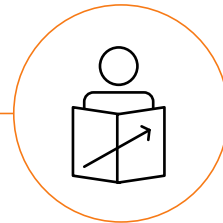
With the SEC’s changes, companies now have the opportunity to choose their own disclosure thresholds for proceedings under environmental laws to which a governmental authority is a party. Deciding whether to do that (and what level to select if you do) should be considered carefully. This is a brave new world because we don’t ordinarily see disclosure of the quantitative disclosure thresholds that companies rely upon being disclosed in SEC filings.

At the 4:08 mark, Howard analyzes the “pro’s & con’s” of selecting a higher disclosure threshold for environmental proceedings. These are among the “con’s” he mentions:

1. Companies will need to actually disclose the dollar threshold used in each annual or quarterly report – except there is no need to mention the \$300,000 default threshold if that is relied upon.
2. Disclosing a threshold that a company itself selects might give ammunition to plaintiff attorneys that the chosen amount is the “materiality” level that should be used in non-environmental related situations.
3. Choosing your own threshold creates its own analysis requirements—including the need to assess whether the threshold is appropriate and being able to explain any changes to it.
4. If a company chooses its own threshold, it will need to (1) update its disclosure controls & procedures, (2) appropriately document the calculation of the higher election threshold amount, and (3) document the assessment & determination that the higher amount is

reasonably designed to result in disclosure of proceedings material to the company’s business or financial condition.

5. It’s unclear how the SEC Staff is going to handle commenting on this area in the future, but this could be a low-hanging fruit question for them to ask (at least in the early years) that the company confirm that it has determined that the higher threshold selected is reasonably designed.



The Random...

The Journey Continues...

Ah, the first day of the rest of my life. I’m so grateful to return to the community I cherish so much – and to be able to give back. When I left my prior job, I really had no idea what was next for me.

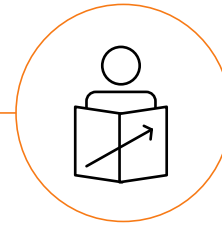
I took pains not to chase the next shiny object – as so wisely urged by my mindfulness mentor Jonathan Foust – although I came close to falling into that rabbit hole several times. The pandemic had a way of centering me, perhaps pushed along by being one of the first to fall sick back in March.

I ultimately decided that making instructional videos – and offering them for free, [with no hitch](#) – was the way to go. As I ramped up the learning curve in terms of video production, graphic design & all the other things that are part & parcel of launching your own venture, this next leg in my journey felt more like a good fit each day.

This just feels right. Being my own boss. Giving back. Teaching. Fostering community. Just



don’t call it a comeback...



Let Me Explain...

What is “Zippy Point”? And How to Best Use It

At its essence, Zippy Point caters to both those new in the field – and those old-timers that have been doing corporate & securities law, corporate governance, E&S, forever and a day. Here are the five ways we do that:

1. **Over 530 Vid-Guides** - Most of our content comes in the form of “[Vid-Guides](#),” over 530 of them – whether they be instructional videos for newbies – or videos explaining the nuances of the latest developments for those that want to remain on the cutting-edge.
2. **“Z-Events,” Starting with the “Proxy Season Spectacular”** - Our “[Z-Events](#)” are major online conferences – where all of the content is on-demand – and free. As always, I work with the speakers to ensure that they deliver practical guidance, that they’re not just reciting the rules. The first “Z-Event” is the “[Proxy Season Spectacular](#)” – with over 30 panels available on-demand right now!
3. **Broc’s Daily Blog** - I also have a [daily blog](#) – where you can keep up with new developments in the field, as well as any new content posted on Zippy Point. You’ll want to input your email address in the top right corner of the site where it says “Get Updates” to be notified when a new blog has been posted. You can select your frequency of updates – daily, weekly or monthly.
4. **“The Five” Monthly Newsletter** - We have a monthly online newsletter – called “[The Five](#)” – which helps cut down on your information overload. You can cruise through the meaty stuff in “The Five” in five minutes or less. How do we do that? Well, the first column in each issue is called: “10 Intriguing Things You Need to Know.” Each of the

ten items gets right to the bottom line for that topic, focusing on the ***practical*** things you need to know.

5. **“Inner Circles” Communities** - We also build community. We do that through our [“Inner Circles,”](#) which are ad-hoc groups that meet on a regular basis – on Zoom - in an intimate setting. “Intimate” meaning that the group sizes are limited – a cap of 20 people - so that they fulfill the goal of really being able to connect with others

All of this – all of the content – on Zippy Point is free. “Free” in the sense that I ask that you “pay-what-you-can.” It felt like the right thing to do so that no one is “priced out” of accessing practical content, of attending major conferences. Some of the price tags for this kind of stuff from other providers has really gotten out-of-control.

On my [“Pay-What-You-Can” page](#), you’ll see that I have recommended annual contribution levels – they’re about 10% of what a similar provider charges. And that’s not counting the five major conferences I’m providing for free. If you factor those into the equation, my recommended contributions are about 2% of what you’d pay elsewhere – so please do what you can to help keep Zippy Point alive. I’m certainly not trying to gouge you – I’m just trying to do what seems just & fair. Thank you for your kindness.

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 these categories:

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