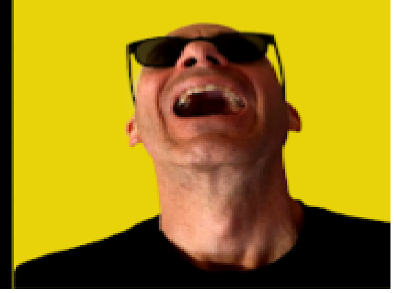
Zippy Point

Right to the Point. Every time.

"The Five"

April 2021



10 Intriguing Things You Need to Know

1. Climate Disclosures: The SEC Chair's Statement

Three things to know about SEC Chair's Allison Herren Lee's statement on climate-related disclosures:

1. **Corp Fin Will Review '34 Act Disclosures** – The SEC Staff will be pulling periodic reports from companies to conduct a comprehensive review for a specific topic (ie. climate risks) – and likely will publish a study of their findings at the end. This kind of review for a particular issue happens about once per decade.

2. **Unknown If Comments Will Result** – This review may – or may not – result in companies receiving comments on their disclosures in this area, which would require them to improve their disclosures going forward.

3. **Updated Climate Guidance or Rulemaking Coming** – It's clear from the Chair's statement that the SEC intends to update its 2010 guidance about climate – whether that happens by rulemaking or interpretive guidance remains to be seen. The statement does mention "material information" in the last paragraph.

It's probably no coincidence that Corp Fin just hired back my friend – Kristina Wyatt – to serve as Sr. Counsel for Climate & ESG to Acting Corp Fin Director John Coates. In this Bloomberg Law piece, Coates makes clear that ESG is his #1 priority…

2. The SEC's "ESG Enforcement" Task Force: What Does That Mean?

Here are three things to know about the SEC Enforcement Division's announcement that it has created a "Climate & ESG Task Force":

1. Not just limited to the Task Force's 22 members – The announcement notes that this new Task Force will be led by Enforcement's Deputy Director and will have 22 members – but that the Task Force will oversee a Division-wide effort. This is significant. The Task Force will facilitate the work of the 1300+ other Enforcement Staff members that might pursue ESG-related actions.

2. Task Force will "proactively" go after ESG misconduct – Here is a phrase from the press release to note: "the Climate and ESG Task Force will develop initiatives to proactively identify ESG-related misconduct." What does that mean?

Well, it's not good news for those funds out there that have been sticking an "ESG" label on their fund because it's the flavor of the year. Just a few days prior, the SEC's Division of Examinations announced that it would make it a priority to kick the tires if a fund claimed it was ESG-oriented, but it really isn't (actually the SEC's announcement wasn't too clear about that but follow-up media articles made the point). This "fudged label" issue is a HUGE problem and should be easy pickings for Enforcement.

3. Not likely that public company disclosures targeted (initially) – So long as companies are following the SEC's 2010 guidance, they shouldn't have anything to fear about from this new Task Force. As noted above in #1, the SEC does intend to update that 2010 guidance – and once that happens, I imagine more ESG disclosures will be mandated and your Enforcement risk will rise.

On the other hand, this step could chill voluntary disclosures. Of course, it will be hard to gauge that except for anecdotal evidence…

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By the way, the two Republican Commissioners issued a statement indicating they're unsure of the meaning of the flurry of ESG-related statements from the SEC over the past few weeks. That it perhaps is better to await the findings of Corp Fin's disclosure review and the Examination staff's findings before going to the trouble of all this fanfare.

I disagree. One way that the SEC deters misconduct is by making some noise – and given the urgency of climate change, there can't be enough noise coming out of the SEC. Time is short…

3. 6 Mistakes Companies Make When Communicating With ISS

This is one of the more practical Vid-Guides I've made. No topic raises more ire in the governance world than the merits of ISS. I've never really understood that personally. But it remains true today, just as it did 20 years ago. I urge you to overcome that bias – and spend your energies towards putting your best foot forward. Not making the common mistakes that many do.

The six biggest mistakes that you can fix are:

- Overcome your disdain for ISS
- Communicate (very) clearly
- Don't hold back or misdirect
- Don't mention that you buy from ISS
- Provide a 1-pager when your proxy is filed
- Do your homework

4. Interim Operating Covenants: Hot Takes

In this blockbuster Vid-Guide, Freshfields' Ethan Klingsberg, Simpson Thacher's Alan Klein and Kirkland & Ellis' Daniel Wolf get into the nitty gritty of "interim operating covenants," including:

- Exceptions to MAE and ordinary course covenants (eg. Cooper Tire)
- Ordinary in the face of the extraordinary (eg. MAPS Hotels, others)
- Not to be unreasonably withheld consent
- Specific drafting implications (eg. MAPS Hotels)
- How we are working this out in real time and in the real world

At the 10:45 mark, Daniel talks about attempting to predict the next major unforeseen event that could warrant a carve-out – and mentions the recent merger agreement with Goodyear as one example where the parties attempt to do that.

5. All You Ever Wanted to Know About Stock-for-Stock Mergers (But Didn't Know What to Ask)

In this comprehensive Vid-Guide, Cooley's Kevin Cooper does a great job walking us through all you need to know about the possible structures and pitfall for stock deals, including:

1. Show me the… Stock Certificate? Why Do a Stock-for-Stock Deal?
2. The Tax Man Cometh… Back Later? Structuring for Tax Deferral
3. Double the Diligence, Double the Fun? Reverse Due Diligence
4. Mo' Stock, Mo' Problems: Buyer Shareholder Approval Requirements
5. Making the Exchange: Exchange Ratio Mechanics
6. Maybe Two (Steps) are Better than One? Exchange Offer vs. Merger Structure
7. License and Registration, Please: SEC Considerations for Buyers, Targets and Stockholders

6. Violating FD "Old School" Style!

File this under if you're gonna violate Reg FD, go ahead and really violate FD! Selective one-on-one calls with 20 different analysts! This action by the SEC against AT&T is "old school"!

Here's my 3-minute Vid-Guide on the law here – and here is an excerpt from this Fried Frank memo:

> Interestingly, the SEC also alleges that AT&T's outreach to analysts in and of itself conveyed material, nonpublic information. Specifically, the complaint alleges that the IR executives knew or recklessly disregarded "that the timing of the calls (i.e., near and after the quarter's end) and the subject matter discussed (i.e., AT&T's wireless equipment revenue and/or upgrade rate) also independently conveyed, apart from the specific details that were discussed on a given call, material nonpublic information to the analysts—that their revenue and related estimates were higher than AT&T's expected results."

7. Golden Parachute Disclosures: Hot Takes

In this Vid-Guide, Thompson Hine's Nathan Holmes helps us understand golden parachute disclosures in deal proxies, including:

1. How do golden parachute compensation disclosures differ from the change in control and termination disclosures required in the annual proxy statement?
2. What about "say-on-golden parachute"?
3. Who are the "named executive officers" whose compensation must be disclosed in the Golden Parachute Table?
4. Tax gross-ups have been a hot-button issue for years. How do the disclosure rules address them?
5. How should footnotes to the Golden Parachute Table be used?

8. Three Things You Should Know About "equityabacus" & Stock Ownership Guidelines

One of the best parts of my career is that I get to check out new products before they're unleashed to the public. I love this one! In this Vid-Guide, equityabacus's Geoff Hammel – explains how his platform for managing share ownership guidelines works, including addressing how it:

- Saves time for program administrators
- Helps compliance for those insiders needing to meeting their goals
- Improves engagement with insiders

9. How "Clubhouse" Works (& Whether It's Worth It)

Wouldn't it be cool to eavesdrop on a bathroom conversation between Bobby DeNiro and Christopher Walken? That's sort of like Clubhouse. Well, sort of.

Think of Clubhouse as thousands of channels of "talk radio," each channel covering a niche topic – led by experts in that particular field – in which the audience may brought up to add their ten cents or ask a question. It's quite powerful. And quite addictive. I love it.

In this Vid-Guide, I cover three things:

1. What is Clubhouse?
2. Whether it might be worth trying
3. A few tips if you do decide to try it

10. 20 Ways to Use "Additional Soliciting Materials" for the Proxy Season

During the proxy season, if you solicit votes for your annual shareholders meeting – other than delivering your proxy – you must first file that communication with the SEC as "additional soliciting material" before you use it.

In this Vid-Guide, we explore the types of additional soliciting material that companies file. "Additional soliciting material." are probably more commonly known as "proxy supplements" or "supplemental materials."

11. Reaching Quorum: TD Ameritrade Eliminates Discretionary Voting

This note from Alliance Advisors' Tom Ball analyzes the impact of TD Ameritrade eliminating discretionary voting upon the ability of companies to reach quorum and more. Here is an excerpt from Tom's note:

> For some issuers, especially small cap companies or those in certain sectors, that have a significant number of shares held by retail holders in broker name (often over 50% of the outstanding shares), the decline in the discretionary vote poses problems on two fronts. The first problem may be obtaining enough votes just to reach a quorum necessary to hold the annual meeting. To ensure a quorum, many companies include the approval of auditors (which, as noted, is routine and allows brokers to issue a discretionary vote) on the agenda

solely to trigger the discretionary vote. But with the decline in overall discretionary voting, the dilemma some issuers will face is simply achieving a quorum of 50%.

The second problem is the impact that the loss of the discretionary vote will have on specific proposals, such as reverse splits and increases in authorized. Over the years, many issuers have depended on the broker discretionary vote to pass these proposals. However, as with achieving enough votes for a quorum, the ability to pass these proposals may now be in doubt.

Even companies that are not concerned about achieving a quorum to hold the annual meeting or passing certain proposals, should be cognizant of the fact that the loss of the TD discretionary vote may result in a decline in their overall vote. Alerting senior management and the board to this fact, in advance of the annual meeting, may be prudent.

Hard Conversations…

Shareholder Activism: Companies to Be Challenged How to Use Their Excess Funds?

In this "Financial Times" article, **Ethan Klingsberg** of Freshfields notes this:

Publicly traded companies are increasingly hearing privately from investors that the era of the "liquidity premium" is coming to an end. This fading of the valuation boost for companies with good access to liquid sources of funding has significance for investor relations, executive teams and boards of directors.

At the onset of the pandemic, publicly traded companies almost universally cut share buybacks and bulked up on liquidity. Incredibly, lenders were calling corporate treasurers to ask them if they wanted to draw down fully on credit lines even though there was no immediate need for the cash. Other companies went even further and took on large cash infusions in the form of Pipes (private investments in public equity, in which discounted stock is sold to private equity groups).

One of our clients issued almost twice its market capitalisation in the form of a Pipe. Markets in turn rewarded these corporations with "liquidity premia" or, in other words, inflated valuations in recognition of their fortified condition. As we shift to the recovery era, corporations will start to see their liquidity premia erode.

The last time this happened on a large scale was a decade ago as we emerged from the financial crisis. The consequence was a rise in aggressive calls by activist shareholders for excess capital to be either returned to shareholders through buybacks and dividends, or put to use through near-term capital projects to boost earnings along with mergers and acquisitions.

The hallmark of this shift will be activism by hedge fund shareholders. The campaign that Elliott Management commenced against Crown Castle in the second half of last year, which entailed a critique of capital allocation and sought an increase in allocation to dividends, is representative of what is to come. As is typical for investor activism campaigns these days, Elliott created a flashy webpage — Reclaiming the Crown — flush with colourful open letters along with ancillary attacks on the compensation of executives and the composition of the board.

Not surprisingly, companies that already have activists in their profile — such as Comcast and Sallie Mae where Trian and ValueAct, respectively, have been agitating — have now been among the first to announce a return to buybacks. At the end of January, Comcast announced that it would recommence share buybacks in the second half of 2021 with the goal of ramping up to pre-pandemic levels and Sallie Mae announced a programme to buy back about 20 per cent of its then-market capitalisation.

Activist funds will be scanning publicly traded companies for issuers with liquidity cushions that are too large. As a result, executive teams must without delay do their homework on their "recovery era" business plan. As part of this effort, they need to map out plans for capital allocation. This exercise requires balancing the management of economic uncertainties and debt covenants, pre-empting demands for buybacks and special dividends, and the pursuit of returns from new capital expenditures and M&A strategies.

In the boardroom, public company directors have to be sure that capital allocation is at the top of the agenda for upcoming meetings. Otherwise, there is a reasonable chance that an activist investor will put it there for them. They should ensure they are comfortable with the internal forecasts that support management's recommendations on capital allocation, understand the effects of these recommendations on valuation, and press their investor relations teams to be candid with the board about whether these plans chime or conflict with shareholders' expectations.

It is critical for investor relations teams to make sure that their company's narrative on capital allocation for the recovery era is proactively sold to their shareholder base. If a company needs to be more conservative because of business plan risks or debt covenant requirements, its messaging needs to make this clear and provide visibility about timing for a move towards allocating less capital to preserving liquidity. If a company is taking steps away from preserving liquidity, but is allocating capital in directions other than returns of capital to shareholders, then it needs to be clear to investors about what alternatives are being pursued and what benefits are expected.

As we have seen over the past 12 months, excess liquidity can be a nice problem to have. However, in order to fend off the forthcoming activist campaigns, companies must act proactively to maintain control of their market narrative as we move away from the era of the liquidity premium.

Keen Observations…

Erroneous Voting Standards Disclosure: Happens Every Year

As noted by independent inspector **Carl Hagberg** in this Vid-Guide about "How to Draft 'Voting Standards' Disclosure," it's inevitable that every year, there are proxies out there that mistakenly describe the voting standard that applies to one or more items on that company's ballot.

Sometimes it's because a drafter is cutting & pasting from the proxy of another company. Sometimes it's because the law has changed in that company's state of incorporation and the drafter didn't check. And sometimes, it's plain negligence. In fact, there are instances where the voting standard is correctly articulated in one part of the proxy – but then erroneously described later on in the same document!

Often what trips folks up is the treatment of broker non-vote. Here's a note from **Alliance Advisors' Tom Ball** about this problem:

> Some drafters out there really don't understand how broker non-votes work, and therefore get the disclosure wrong. For example, the proxy disclosure regarding broker non-votes for a company that is having a special meeting with only a non-routine proposal on the agenda often reads: "broker non-votes will be counted for purposes of establishing a quorum."
>
> This disclosure is wrong since there are no broker non-votes in this situation. Broker non-votes only occur when there are both routine (such as the ratification of auditors) and non-routine (such as the approval of a stock option plan) proposals on the agenda. If the only proposal on the agenda is non-routine, there are no broker non-votes.
>
> Drafters of proxy disclosure must remember that broker non-votes are not votes at all. They are, as the name implies, non-votes and do not exist for quorum purposes; they are merely a convenience that allows the tabulator to balance the For, Against and Abstain votes on a routine proposal with the For, Against and Abstain on a non-routine proposal.
>
> If a broker has 1,000 shares, they can issue a proxy for all 1,000 shares on a routine item. However, on a non-routine proposal, they can only issue a proxy for the total number of shares that the underlying beneficial holders have voted. If only 700 shares are voted, the broker can only issue a proxy for 700 shares. The proxy they issue will not show the

broker non-votes. The unvoted shares are called broker non-votes. Again, they are not votes, they are an tabulating convenience.

For example:

> Two proxies, Discretionary and Non-Discretionary, walk into a bar and each orders a sarsaparilla. The barkeep says that will be 1,000 shares each and asks if they can afford that price. Both Discretionary and Non-Discretionary say “no problem”, so the barkeep pours each a sarsaparilla and sets them down on the bar.
>
> Discretionary reaches into her pocket and puts the thousand shares on the bar since she has full discretionary authority with the shares. But when Non-Discretionary goes to pay, he tells the barkeep he has the 700 shares that were voted and puts those on the bar.
>
> The barkeep asks for the other 300. Non-Discretionary says they are broker non-votes so he does not have the actual shares. The bartender says they don’t count toward the total and takes the sarsaparilla away.

The Random…

The Birth of "RealCorporateLawyer.com": 20 Years Ago…

How many of you remember RealCorporateLawyer.com? I sure do. It was the first website I ever launched, the 20th year anniversary was a few weeks ago.

It was launched back in an era when it took a good six months to launch a simple website, one that you could easily launch in a single day today. I made this Vid-Guide for those old-timers curious about how that launch came about…

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 who I am. So I'm putting my talents to use in 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. Thank you for being a part of the community – and here's my 2-minute video explaining this same concept. And since all the content on ZippyPoint.com is complimentary, please "Pay-What-You-Can" to help keep this fine platform alive & well…

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

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