



10 Intriguing Things You Need to Know

1. Wow. The SEC Seeks “Climate Disclosures” Input on 15 Questions

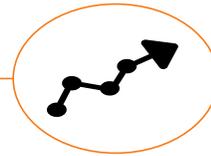
On the heels of [Corp Fin Director John Coates’ speech](#) the week before, Acting SEC Chair Allison Herren Lee delivered [this speech](#) last month about “meeting investor demand for climate & ESG information at the SEC.” In connection with the speech, the SEC published [this statement](#) seeking comment on climate change disclosure.

The statement lists 15 questions upon which the SEC seeks input. Here is my attempt to summarize those 15 questions:

1. How can the SEC best regulate? Where – and how – should disclosures be provided?
2. What climate information can be quantified and measured?
3. What are pros & cons of private ordering?
4. What are pros & cons for industry-specific standards?
5. What are pros & cons of drawing upon existing standards?
6. How should disclosure requirements be modified over time?
7. What existing SEC regs should climate requirements be tucked into (eg. S-K or S-X)?
8. Should companies disclose details about their climate-disclosure processes?
9. What are pros & cons of any disclosure framework being global?
10. How should the disclosure standards be enforced?
11. Should the SEC consider other measures to ensure the reliability of climate disclosures?
12. What are pros & cons of a “comply or explain” framework?

13. Should there be a “Climate Discussion & Analysis”?
14. Should the SEC regulate private company disclosures?
15. Should “climate” be part of a broader ESG disclosure framework?

Chair Lee’s speech has a lot in it. It’s interesting to see that the SEC might reverse course on part of the shareholder proposal amendments that were adopted last year – some Senators have introduced a resolution under the Congressional Review Act that would do that - as well as the discussion on investment adviser disclosures and universal proxies...



2. Prudential’s “Summary ESG Report”

Hats off to Peggy Foran & her team. In this [7-minute Vid-Guide](#), I walk us through [Prudential’s “Summary ESG Report”](#) – all 18 pages, which includes the cover – as well as share some initial overarching thoughts about the value of summary ESG reports overall. This may well be the first “Summary ESG Report” out there!

Also, here is [Prudential’s 2021 proxy statement](#) which includes some of the same information as the company’s Summary ESG Report.

We have now posted [12 panels for the “Doing Deals: Hot Takes” conference](#). Available on-demand right now – for free.



3. The Latest Capital Market Developments

In this [25-minute Vid-Guide](#), Joe McLaughlin and Mayer Brown’s Anna Pinedo talk about the 6th edition of their seminal book – “Corporate Finance and the Securities Laws,” including:

1. What are some of the topics that are addressed in the update to the book?
2. Do you think that the SEC and the SEC Staff provided sufficient guidance and relief to market participants during the COVID crisis? Do you think that we will see additional COVID related enforcement actions, like the Cheesecake Factory action?
3. Do you think that the SEC has done enough recently to promote IPOs?
4. Were you surprised to see the SEC approve the NYSE rule change allowing for primary capital raises in connection with direct listings, especially because of the questions raised about Section 11 liability?
5. Do you think that if the safe harbor for forward-looking statements in connection with IPOs were addressed, it would resolve some of the issues being raised about the ability to discuss projections more freely in the context of mergers with SPACs?
6. Do you anticipate that the SEC will do more in terms of amendments to the accredited investor definition?
7. The Democratic Commissioners opposed a number of the rule changes that were adopted during the Chair Clayton tenure, including the amendments to the exempt offering framework—do you anticipate that Chair Gensler will roll some of these back?
8. What about the disclosure effectiveness-related changes—do you think that the SEC’s disclosure effectiveness initiative has been helpful in “modernizing” and “simplifying” SEC disclosures?



4. Merger of Equals: Hot Takes

In this [30-minute Vid-Guide](#), Sullivan & Cromwell’s Scott Crofton and Matt Goodman cover quite a bit of ground when it comes to deals that involve a “merger of equals,” including covering the financial considerations, the tendency to have reciprocal terms and the governance, social and executive compensation issues that need to be hashed out.



5. The Definitive Guide to Debt Tender Offers

In this [32-minute Vid-Guide](#), Gibson Dunn’s Jim Moloney and Ed Ricchiuto cover a lot of ground discussing the many aspects of debt tender offers, including:

1. Understanding the debt tender regulations
2. “5-day” business offers & their conditions
3. SEC Staff views on lock-ups and consents
4. “Waterfall” debt tenders



6.5 Solicitation Strategies for Say-on-Pay

In this [9-minute Vid-Guide](#), Alliance Advisors’ Reid Pearson gives us five practical solicitation strategies to obtain as successful a say-on-pay result as you can at the annual shareholders meeting. They really are practical.



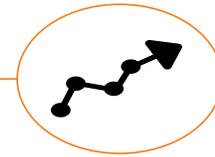
7. Don’t Get Cute With Shareholder Proposals: The Staff’s Updated Proponent Guidance

This [new Corp Fin guidance](#) about accommodating shareholder proposal proponents this year probably falls under the category of my [2-minute Vid-Guide](#) entitled “Don’t Get Cute With Shareholder Proposals.”

It just doesn’t pay off in the long run to run interference with proponents. You’ll earn a reputation of not being fair. A reputation not worth having for such a minor offense in the grand scheme of things – but a reputation that will reach your largest shareholders even if the

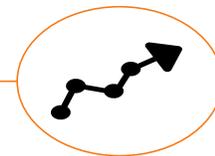
proponent is someone that owns a mere few thousand dollars of your stock. Is that big hit to your reputation worth it?

Anyway, the new Staff guidance confirms that you should allow your proponents – if permissible under state law – to present their proposals by “alternative means” (eg. phone) this year – and that the proponent’s inability to attend in person is considered “good cause” under Rule 14a-8(h), meaning that you can’t knock out that proponent’s proposal in the following two years just because they didn’t attend your meeting in the flesh...



8. How “Foresight” Can Improve Board (& Corporate Secretary) Effectiveness

In this [8-minute Vid-Guide](#), Foresight’s Carol Ward explains how Foresight’s BoardOps works. And how it can make your life as a corporate secretary much easier – plus make the board’s job more effective in the process!

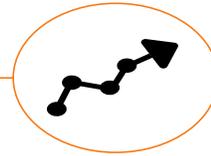


9. A Primer on “Green Bonds” & “Social Bonds”

In this [20-minute Vid-Guide](#), Perkins Coie’s Allison Handy joins us to explain all you need to know about “green bonds” and “social bonds” – how to conduct those types of bond offerings, including:

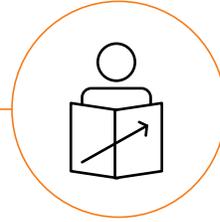
1. What are Green, Social and Sustainability Bonds?
2. What are the “Green and Social Bond Principles” – the guidance from the International Capital Market Association?
3. What kinds of projects can qualify as Green Projects or Social Projects?

4. The GBPs and SBPs recommend external review and confirmation of alignment of a bond program with those principles. What are the different types of external review? And what kinds of company might use what approach?
5. Given the extra effort and expense involved, why issue Green or Social Bonds?



10. Why You Should Use a “Special” Tabulator for Your Employee Plans for Your Shareholders Meeting!

In this [5-minute Vid-Guide](#), Carl Hagberg, a renowned inspector of elections, who also publishes the “Shareholder Service Optimizer,” discusses how using a boutique firm that specializes in handling employee-shareholder votes that are cast through employee stock plans might be a good idea. A potential big boost when it comes to vote tabulation for shareholder meetings.



Hard Conversations...

SPAC PIPEs and Insider Trading Concerns

Here is an [article](#) from **Jahan Raissi** of Shartiss Friese:

The majority of insider trading compliance questions this year, by a wide margin, have been related to SPAC PIPE offerings. SPACs have been a hot topic for some time now and it has become quite common for a SPAC to raise additional money through a PIPE to finance the acquisition of the target company (the so-called “de-SPAC transaction”). In connection with the PIPE, a potential investor enters into confidentiality agreement in order to learn the identity of the SPAC, the target company, and information about the target company’s business. That information is generally MNPI, hence the compliance questions.

Just like a regular PIPE, an investor usually learns of a potential SPAC PIPE when contacted by a broker. Brokers will ask the investor to enter into a confidentiality and no-trading agreement in order for the broker to disclose the identity of the SPAC and the identity of the company the SPAC is considering acquiring. When the confidentiality agreement is entered into and the identities disclosed, the investor needs to restrict any trading in the publicly-traded securities of the SPAC (the target companies are private).

The investor is, of course, free to buy shares in the PIPE from the SPAC – since the SPAC has the same information as the investor – but the investor cannot trade in the public markets since it is in possession of material, nonpublic information. But when can the investor remove the SPAC from its restricted list and trade in the public markets?

A good confidentiality agreement from a broker (and the terms of the subscription agreement for the PIPE) will set forth in writing when the confidentiality obligation is lifted and the information is no longer considered material and/or nonpublic. Clarity is generally helpful so it is a good idea to have the cleansing events or dates specified in writing. Those events are generally (1) when the SPAC makes a public filing disclosing the de-SPAC transaction and the information about the target company that was made available to the PIPE investors; and (2) if the contemplated transaction with the target is abandoned.

In the first instance, the important consideration is whether public disclosure has been made of all the information material to the SPAC's publicly traded securities that was provided to the investor in the PIPE process. If so, then the investor is "cleansed" and free to trade in the public markets (from an MNPI point of view regarding the information learned in the PIPE process – there could still be contractual or other limitations on the ability to trade). Could it happen that the SPAC fails to publicly disclose all material information provided to the PIPE investor? Yes, in which case the investor would remain restricted – but most SPACs are very mindful of their obligation to make proper disclosure and this should rarely occur.

In the second instance noted above, the abandonment of the de-SPAC transaction, the important consideration is generally one of materiality (unless the abandoned acquisition is publicly disclosed – in which case there is usually no issue with taking the security off the restricted list since the information is public).

The general idea is that the identity of a company the SPAC did *not* to acquire is not material, and likewise the fact that the accompanying de-SPAC and PIPE transactions will *not* be happening at that time is not material information. That is a reasonable conclusion generally, but materiality is very much a creature of particular circumstances and so thought needs to be given to the question of whether any of what was learned in the PIPE diligence process remains material and nonpublic given the totality of circumstances.

The basic insider trading compliance concepts surrounding PIPEs are not new. However, the context of a PIPE in conjunction with a de-SPAC transaction is new to many and warrants careful attention to get it right. If unsure, make sure to consult with your legal or compliance advisors.

Keen Observations...

My SPAC Experience Summed Up in One Word: PCWTS

This [blog](#) by [Adam Epstein](#) is worth reading. Here's an excerpt:

Some small-caps look and feel to institutional investors like “real public companies,” while others are much more like “private companies with ticker symbols” or PCWTS. Savvy investors have learned the hard way to approach PCWTS with extreme caution, and their costs of capital, institutional sponsorship, and valuations reflect the same.

PCWTS have some shared attributes:

- Officers and directors with little/no public company experience
- Websites and investor presentations that are amateurish and/or hyperbolic
- Irregular/poorly calibrated communication
- Quarterly earnings calls that evidence incomplete/misguided preparation
- Needlessly dilutive financings and/or late regulatory filings
- Unusual service provider selections
- 1-on-1s with management that convey a lack of capital markets/regulatory awareness

Most of the de-SPACs my firm has interacted with are PCWTS. It's not a close call. I'm not suggesting that this is true for all de-SPACs, and I'm not even suggesting it's true for most of them. It's just been my personal experience in 2020 and 2021.

Unless the officers and directors of PCWTS figure out what they don't know – and endeavor to learn those things as fast as possible – their small-cap life is not going to be profitable or enjoyable. The buy-side has seen this movie over and over... and over again.

When the dust settles from a SPAC, investors don't really care how they got to be a public company. They are going to be judged like every other public company, and they won't get any grace period. Astute management teams and boards will realize that the SPAC process – though complex, time-consuming and somewhat nerve-wracking – was actually the easy part. The hard bit is the de-SPACing: *the relentless accountability of being a public company.*

Keen Observations...**How Much Are Companies Disclosing About Cybersecurity?**

Here is an excerpt from [this article](#) by Aon’s Laura Wanlass and Christopher Uriarte about how ISS has changed its QualityScore rankings related to cybersecurity, what companies are now disclosing about cyber – and the risks of disclosing too much:

Starting this year, ISS includes several cyber-related questions in the [ISS QualityScore updates](#), under the sub-categories of “Information Security Oversight” and “Information Security Risk Management Oversight.” The table below shows the questions in which the firm is using to rate companies.

Question Number	QualityScore Subcategory	Cyber-Related Question
403	<i>Information Security Oversight</i>	What percentage of the committee responsible for information security risk is independent?
404	<i>Information Security Oversight</i>	How often does senior leadership brief the board on information security matters?
405	<i>Information Security Oversight</i>	How many directors with information security experience are on the board?
402	<i>Information Security Risk Management Oversight</i>	Does the company disclose an approach on identifying and mitigating information security risks?
406	<i>Information Security Risk Management Oversight</i>	What are the net expenses incurred from information security breaches over the last three years relative to total revenue?
407	<i>Information Security Risk Management Oversight</i>	Has the company experienced an information security breach in the last three years?
408	<i>Information Security Risk Management Oversight</i>	What are the net expenses incurred from information security breach penalties and settlements over the last three years relative to total revenue?
409	<i>Information Security Risk Management Oversight</i>	Has the company entered into an information security risk insurance policy?
410	<i>Information Security Risk Management Oversight</i>	Is the company externally audited or certified by top information security standards?
411	<i>Information Security Risk Management Oversight</i>	Does the company have an information security training program?
412	<i>Information Security Risk Management Oversight</i>	How long ago did the most recent information security breach occur (in months)?

Source: ISS

The questions under the Information Security Oversight subcategory are commonly disclosed in the proxy statement already (often under the board oversight risk section and board matrices/board skills and qualifications sections). However, the questions ISS is including under Information Security Risk Management Oversight are not only uncommon in the marketplace but could result in risks associated with disclosing sensitive information should it be included in publicly filed Form 10-K disclosures.

We reviewed 10-K disclosures at S&P 1500 companies that have filed a Form 10-K for the most recent fiscal year as of January 31, 2021. Key findings include:

- Most of the companies disclose their compliance with The California Consumer Privacy Act, General Data Protection Regulation and other Regional Cyber Regulations Act.
- Mostly the cyber-related risk is regulated by a specific board committee, often the audit committee.
- A majority of companies disclose their preventive measures to reduce risk related to cyber. However, fewer firms disclosed details about actual steps taken, such as implementing firewall, auto backups and anti-virus software.
- Some companies had a designated cyber risk position in leadership, with chief information or security officer being most prevalent.
- Some companies engaged with third parties, however there was no disclosure of the vendor name.
- Most companies maintain cyber insurance, however there was no disclosure of their coverage amount.

Also see this [Audit Analytics blog](#) for disclosure trends...

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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