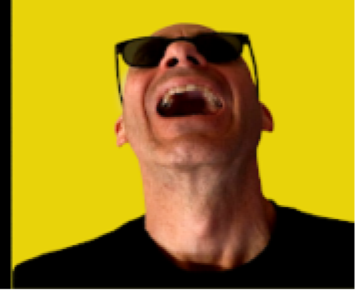
Zippy Point

Right to the Point. Every time.

"The Five"

August 2021



10 Intriguing Things You Need to Know

1. What Do the Comments on the SEC's Climate Disclosure Request Look Like?

As part of my recent launch of this 'ESG Professionals Network" site, I blogged about the 6000 comments that have been submitted to the SEC about possible climate disclosure rulemaking, 300 of which are from institutional commentators. Pulling from this Davis Polk memo, I noted that analysis of the comments reveals a lot of people want industry-specific standards; want to draw from an existing framework; and want quantifiable data (as compared to qualitative disclosure). Half want mandated disclosure of Scope 3 emissions.

The highlights of my blog were:

1. More people than not think the SEC has the authority to mandate climate disclosures.
2. A lot of people want industry-specific standards.
3. A lot of people want to draw from an existing framework.
4. More people are mixed about having a single global standard than I expected.
5. A lot of people want quantifiable data, as compared to qualitative disclosure.
6. Half want mandated disclosure of Scope 3 emissions. Guess I'm burying the lead here.
7. A lot of people want safe harbor protection from liability.
8. A lot of people think internal controls should cover climate reporting (but not quite as many want an assurance requirement – yet more than half do).
9. There's a real split about whether the SEC's mandate should apply to private companies.

10. At the end, Davis Polk summarizes 30 individual comment letters, representative of the various stakeholder views.

Don't forget to input your email address on the right hand of the site where it says 'Subscribe' to be alerted to new content…

2. Are You Conducting Cyber Breach Fire Drills Yet?

In this "Public Chatter" blog, wearing my Perkins Coie Strategist hat, I threw out the idea that you should be earnestly planning for your next cyber breach by conducting a tabletop exercise. Here's the entirety of that blog:

> When I was a kid growing up in Chicago, our school would have periodic "atomic bomb" drills – which really was just another fire drill under another name. We would line up and dutifully head outside into the snow. It wasn't until I got a little older that I started to wonder, "how is going outside going to protect me from a nuclear blast?"
>
> Meaning it's silly to conduct a drill just for the sake of conducting a drill. But if you know the threat is real – and you can be better prepared by conducting a drill – isn't that a good idea?
>
> When it comes to cyber breaches, it certainly seems like it's more of a matter of time for a breach to occur, rather than a question of "will it ever happen to our company?" Given that, it sure seems like a good idea to be as well-prepared as possible so that going into crisis mode doesn't overwhelm you.
>
> And with the SEC bringing this enforcement action recently against a company for allegedly deficient disclosure controls related to a cyber breach, the time is ripe to kick the tires on your procedures. In that case, a big factor for the SEC's action appears to be a lack of communication between those that discovered the breach – and those responsible for making public disclosures about matters of importance to the company.
>
> That's why planning a fire drill is so critical. A tabletop exercise. The people in your company most likely to uncover a breach aren't accustomed to dealing with folks in the C-suite. They're not attuned to public disclosure obligations. And drafting protocols and

conducting training is a good start to propelling them up the learning curve, but it really is no substitute for doing a dry run and seeing if it works in practice.

With a dry run, you'll find out whether those down below can find the courage to tell their superiors that a breach might have happened on their watch. You'll find out if those superiors do the right thing themselves. Are senior managers asking the right questions? How about members of the board?

You'll also be forced into learning what your weaknesses are within your current disclosure controls. You'll perhaps draft some documents that you'll need on an emergency basis when that dark day arrives. You'll find out whether you need to bring in some advisors to learn more about how to handle a breach. And perhaps after you conduct your first planned fire drill, you'll be brave enough one day to conduct an unplanned drill to really test your colleagues…

3. An In-House Perspective: Challenges of Collecting Real-Time ESG Data

Here's something I recently blogged on the new "ESGProfessionalsNetwork.com" site that I just launched:

Matthew Sekol of Microsoft has this interesting blog that analyzes the challenges of collecting real-time ESG data. Microsoft has a partner, ESGeo, to help collect ESG data. Here is an excerpt:

Corporates: The (In)Complete ESG Data View

ESG data starts with the Corporates, whether private or public. The data challenges start as teams gather data from internal systems, collaborating across business units. This data shows their own ESG footprint and could include things like building and product CO2 emissions, diversity strategies, and transparency reports.

Fortune reported that “94% of the Fortune 1000 companies are experiencing disruption to their supply chains as a result of COVID-19,” a black swan ESG event. To understand their ESG risk, Corporates need to gather data externally from their supply chain. This data collection could range from tens to hundreds or even thousands of suppliers. Corporates will encounter a wide range of ESG maturity across their supply chain, including those downstream companies that are not equipped to respond.

4. Director Departures: Getting Out While the Going is *Not* Good

In this “Public Chatter” blog, Perkins Coie’s Stewart Landefeld covers a topic that you’re bound to deal with, but few have written about. Here’s the entirety of that blog:

> “I can’t sleep at night. I don’t agree with much of what is being said and done. I want to be responsible, but I am just not comfortable.” Over the years, I’ve heard this story from a lot of my director clients.
>
> I get asked: “What is my moral obligation to stay on the board?” It’s a good question – and good directors should be asking that. Being a “fair weather” board member doesn’t sit well with most directors as they hold themselves out as someone with integrity.
>
> This dilemma becomes even more acute for those directors who have served on a particular board for only a handful of years. They’re worried about what that might signal to the market if they departed the board early. How will that sit with investors and analysts? How would it impact the directors that remain? And what about other boards that might decide not to take a chance adding them to their board because they look like a “jumper”?
>
> It will depend on the circumstances but my guidance typically falls near the tree of: before resigning, take these three steps and you’ll feel better and be doing the responsible thing:

1. Assess what's making you uncomfortable.

2. Do all you can to seek to address the issues. That includes the need to create a record (that's important, to come up with some sort of documentation) – that the board has taken all the possible steps to address any improper or possibly illegal actions identified at the company. You want to establish a clear record that you – and any fellow resigning directors – have done all you possibly can to address the malfeasance, illegality or impropriety. Then, in anticipation of resignation, circulate a draft statement of the reasons, the efforts taken, and how those efforts have been stonewalled.

3. Pass the baton. So then – before you leave remember that your successors on the board will need to grapple with many of the same issues. So do a thorough baton-passing to the directors who are remaining or coming on board.

5. NYU Stern's Free "ESG Study" Database

Here's something I recently blogged on the new "ESGProfessionalsNetwork.com" site that I just launched:

> Over 1400 studies over the past five years? That's a whole lot of research. The NYU Stern Center for Sustainable Business partnered with Rockefeller Asset Management to pour over those studies and create a new meta-study. They call it "meta," I call it "mega."
>
> The six big findings were:
>
> 1. Time Matters – Improved financial performance due to ESG becomes more noticeable over longer time horizons.
> 2. Investment Strategy Beats Negative Screening – ESG integration as an investment strategy performs better than negative screening approaches.
> 3. Downside Protection – ESG investing provides downside protection, especially during a social or economic crisis.
> 4. Leads to More Innovation & Risk Management – Sustainability initiatives at corporations appear to drive better financial performance due to mediating factors such as improved risk management and more innovation.

5. Low-Carbon is Key – Managing for a low-carbon future improves financial performance.
6. Strategy Matters – ESG disclosure without an accompanying strategy does not drive financial performance.

By the way, those 1400 studies that examine the relationship between ESG and financial performance are now freely available in the NYU Stern's "ROSI Research Database." Hats off on such a noteworthy & grand accomplishment! Tensie Whalen is doing some really great things at NYU Stern.

And here is a deck on ESG engagement studies by Nawar Alsaadi capturing the outcome of three meta-studies (covering 3200 ESG research papers). Nawar says this body of work confirms without a doubt that ESG factors integration in the investment and corporate management process creates value at multiple levels. Said another way, responsible investing (and management) is not just morally superior to traditional investing, it is empirically more profitable.

6. A Comprehensive Look at Insider Trading Policies: The Litigator's Perspective

In this 75-minute Vid-Guide, DLA Piper's Deborah Meshulam and King & Spalding's Dixie Johnson dig really deep into everything you need to know about insider trading policies, including:

1. Is a policy required and if so, by what statute/rule/reg and what is the extent of what's required (as opposed to advised)?
2. Definition of "Material Non-Public Information"
3. Scope / Covered persons & transactions / Differences for Section 16 persons
4. How the blackout period works
5. Exceptions to the policy
6. 10b5-1 plans
7. Pre-Clearance & inquiries / Who should pre-clear / Reporting of violations/ Attorney-client privilege issues for communications and records

8. Sanctions & penalties
9. Acknowledgement
10. Effective communication of the policy
11. How do you deal with "hot topics" – like cybersecurity breaches? Do you add them into the policy or address them in another manner?

7. The NYSE Changes Its Related Party Transaction Rule: 4 Things to Do Now

In this "Public Chatter" blog, Perkins Coie's Jason Day covers a "sleeper" NYSE rule change. Here's an excerpt from that blog:

> Seems straightforward enough – but what should a NYSE-listed company do now?
>
> 1. Check your governance documents that address related party transactions and conflicts like your code of ethics, corporate governance guidelines, committee charters or standalone conflicts polices to be sure they comply with the new rule:
>
> – Make sure the audit committee or another independent board body is charged with *prior* review of related party transactions. Note it requires prior review, not ratification.
>
> – Make sure the definition referenced – or used – is at least as broad as Reg S-K 404 (without the transaction value threshold).
>
> 2. Consider if you need to change – or broaden – your process for identifying potential related party transactions to comply with the newly adopted definition. One area to consider is compensation of employees who are family members of directors or executive officers. Existing arrangements for employees who have previously been under the transaction value threshold may need to be reconsidered.
>
> 3. Check the related party question in your D&O questionnaire and make sure it works to pick up these transactions (perhaps dropping a mention of the $120,000 transaction value).

4. Review your related person transaction approval process disclosures in your proxy statement to make sure it reflects any changes you make to your approval process.

8. Yeah, I've Got a Footnote Philosophy for Form 4s

In this "Public Chatter" blog, Perkins Coie's Kelly Reinholdtsen gets into the footnotes of Form 4s. Here's the entirety of that blog:

> I'm into footnotes for Section 16 reports. They help provide clarity and eliminate confusion. They help companies look like they're not hiding the ball. And allow shareholders to understand details of a transaction that might not be evident just from the disclosures in the tables.
>
> A good example is using footnotes liberally to denote that an insider's transaction occurred pursuant to a Rule 10b5-1 plan. An insider's reputation can take a big hit if a reporter "unearths" a trade that makes it seem like the insider exercised discretion at a time they knew something nonpublic.
>
> Hopefully, the reporter would dig deep enough to read the footnote noting that the insider didn't exercise discretion in that case. Even better is if the SEC adopts the Council of Institutional Investor's suggestion to require insiders to check a box on Forms 4 and 5 if a transaction occurs under a Rule 10b5-1 plan. That would make it very clear whether a trade was pre-planned or not.
>
> Of course, in a footnote, you'll want to include all details necessary for a full understanding of the transaction, particularly the extent to which the transaction increased – or decreased – the insider's beneficial ownership or affected their economic interest in the securities.
>
> Most footnotes are fairly short, two or three lines. But on rare occasion, you'll see a footnote so long that it'll bleed into a second footnote – because there's a character limit for a single footnote set by the SEC's Edgar database.

> Often a Section 16 filing doesn't require a footnote. But when it does, go for it!

9. Apple's ESG Web Pages Are Good Examples

Here's something I recently blogged on the new "ESGProfessionalsNetwork.com" site that I just launched:

> In his "Radical Compliance" blog, Matt Kelly does a nice job of describing Apple's new web page devoted to ethics & compliance.
>
> I should mention that Apple also has an "Environment" web page and a "Supplier Responsibility" web page – as well as an "Inclusion & Diversity" web page. All of these are listed among the links at the bottom of every page on Apple's site.

10. The Bloggers Roundtable: How to Blog

In this 23-minute Vid-Guide, join a group of those that have been blogging a long time to learn what blogging is all about:

- Kevin LaCroix – The D&O Diary – of RT ProExec
- Steve Quinlivan – Dodd-Frank Blog – of Stinson
- Lyle Roberts – The 10b-5 Daily – of Shearman & Sterling
- Francis Pileggi – Delaware Corporate & Commercial Litigation Blog – of Lewis Brisbois

We talk about:

1. How did you get into blogging?
2. How do you get story ideas?
3. What is rewarding about blogging – and which aspects are the hardest?
4. What is one piece of advice you would give someone new to blogging?

Hard Conversations…

Should Employee-Shareholders Serve on the Board?

Recently, Jim McRitchie has been submitting shareholder proposals in an effort to diversify the board to include current or former non-management employees. Here's an excerpt from his blog about them:

> Employee representation grows long-term value of companies in several ways. According to the National Bureau of Economic Research, giving workers formal control rights increases female board representation and raises capital formation. Employees are also often more diverse than boards in terms of race, gender, and wealth. The German "co-determination" model of shared governance provides a check against short-term capital allocation practices and other benefits.
>
> The 2018 UK Corporate Governance Code encourages boards to establish a method for gathering workforce views. Options include a director appointed from the workforce, a formal workforce advisory panel or designating a director to liaise with workers.
>
> Senators Baldwin and Warren introduced legislation codifying employee representation on corporate boards, noting that modern corporate governance needs to be accountable wider interests, notably employees. Polling demonstrates bipartisan public support (over 53%) for employee representation.

Inside Your Head…

Meditation Isn't a Miracle Cure (But It Does Help)

I don't mention it much, but I actually have a mindfulness blog called "RealGoodFresh.com." Here's a recent entry for those new to meditation:

> I'm in agreement with much of what is said in this LinkedIn post by Mark McCartney entitled "Ignore much of how meditation is sold." Here's an excerpt:
>
> Companies exaggerate its instant positive effects and many meditators do likewise. They have spent their lives being good students in school, good employees at work and can't help themselves in trying to be "good" meditators – competing with each other and regurgitating experiences that they've read about as their own.
>
> None of which is my business, each to their own. The problem I have is that in both the exaggeration of it effect and in the exaggeration of the depth and serenity of someone's practice, it leads people that are new at meditation to feel like they are doing it wrong. They end up thinking they are bad meditators and ultimately quit before they've really started.
>
> But I would say the biggest thing that confuses newbies is that they sit and wait for their mind to be quieted immediately. That's not going to happen. Those stories will still come. You might meditate for 50 years, 100 years, and those stories are still going to float into your mind. That's just part of being human. Meditation won't turn those off. It won't turn you into a robot.
>
> Unfortunately, many beginners expect this sudden transformation – perhaps because we live in a society where the answer to most things is "there's a pill for that." What meditation does allow you to do is to learn to recognize the stories for what they are – they're just stories. And once you get the hang of that recognition, you can start to change the storyline, change the arc of your character – and sometimes even find that complete silence while meditating. Now that's a result I can live with!

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

And since all the content on ZippyPoint.com is complimentary, please "Pay-What-You-Can" to help keep this fine platform alive & well…