

# [ESG Guidelines: A Framework for ESG Considerations in the Real Estate Space](#)

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This article discusses key considerations for developing Environmental, Social, and Governance (ESG) guidelines as they relate to real estate.

## **Overview**

ESG is a hot topic these days for many corporate leaders (and their companies' investors). ESG can be thought of as the conscience or character of a business; it is a framework to evaluate a business's practices and performance or assets on various sustainability and ethical issues from environmental concerns to fairness and equity.

In the real estate space, there are many reasons for parties to consider ESG: regulation, market demands, economics, and reputation and strategy. Governmental laws and regulations, both state and federal, increasingly impose requirements on enterprises or real property assets relating to ESG, particularly on environmental matters, which often include penalties for failure to comply with ESG requirements. More and more companies are determining that environmentally sustainable practices are economically superior to high emission, less fuel-efficient alternatives. There are marketplace and reputational considerations as well. Today's consumers want to buy from a company with ESG integrity and today's employees want to work for that company. With ever-expanding information outlets, a company's reputation, for better or worse, is constantly under scrutiny. So too are its suppliers and service providers, which, of course, include its outside counsel.

In the United States today, there is no uniform legislative framework around ESG and in fact states and local jurisdictions have taken different and/or conflicting views of ESG, including in some cases so-called anti-ESG legislation.

Given all of these considerations, it is helpful for companies in the real estate industry and their service providers to develop ESG guidelines for how they consider and implement ESG in their businesses and for their assets. These guidelines, once implemented, can be refined as time goes on, and regulations, market demands, and factors change. This article is intended to be a high-level overview only, to guide thinking about ESG rather than the particulars of any ESG policy, the specifics of which will vary greatly.

Attorneys seeking to advise their clients on ESG matters might consider the following framework and discussion points.

## **Environmental**

Real estate in particular has a special relationship with the environment. Therefore, the "Environmental" part of ESG has particular importance in the real estate space. Primary environmental factors in crafting ESG guidelines are (1) the environmental impact of a particular piece of real property or real estate company, (2) the company or property's approach to environmental matters, and (3) what environmental policies arise out of (1) and (2).

### ***Environmental Impact***

When evaluating the environmental impact of a particular real estate asset or entity, consider the following:

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- Evaluate and determine how the company and/or its real properties' current and prospective environmental impact are measured by pursuing the following:
  - o Identify data to be collected regarding the company and its real estate. Determine what to measure and how.
  - o Are there any legislative benchmarks and requirements?
  - o Are there any third-party benchmarks (i.e., LEED Certification, GRESB, etc.)? How best can the company's operations and/or real estate be measured using these yard sticks?
  - o Consider use or overuse of natural resources (water, electricity, gas, etc.).
  - o Are there any outstanding environmental violations?
- Consider the company's business purpose and its current, prior, and future use of real estate. How might that impact the environment?
- Consider any impact on the health and well-being of the company's employees and service providers (i.e., indoor air quality).
- What are the anticipated effects of climate change on the company and its real estate? Is there a plan to ameliorate such effects?
- Determine how to track and measure impacts and shortcomings in these metrics.

### ***Approach to Environmental Matters***

When determining a company's approach to (or attitude and focus on) environmental matters generally, or with respect to a particular real property asset, consider the following:

- How do the company's (and its real estate's) environmental impact metrics affect the insurability and financeability of the company and its real estate?
- Is there a danger of obsolescence from an environmental perspective?
- Will any current or anticipated law or regulations impact environmental matters for the company or the property?
- Are there any requirements from other relevant stakeholders (lenders, investors, tenants, employees, etc.)?

### ***Environmental Policies***

After completing the analyses described in 1 and 2 above, create a concrete measurable environmental policy going forward. In doing so, think about the following:

- How to track and measure changes in environmental impact (and shortcomings in these metrics)
- Scheduling to evaluate and track progress, based upon the company's approach to environmental matters
- Avoiding "greenwashing" (disseminating a misleading environmentally responsible public image) when determining the environmental impact of a particular real estate asset or entity

### **Social**

Social factors—relationships and people matters, including engaging with employees, the community, diversity/inclusion, equality, philanthropy, and culture—are harder to quantify than environmental factors. These are likely matters that companies have already considered and addressed even if not in the context of ESG guidelines. As such, in evaluating and creating the "Social" aspects of ESG guidelines, consider (1) what social policies and procedures the company already has in place (generally or with respect to a particular real property), (2) any internal and external goals in the social context, and (3) using these goals to refine existing policies and procedures.

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**What Social Policies/Procedures Exist**

Evaluating what social policies and procedures the company already has in place (generally or for a particular real property) may include the following actions:

- Determine and document any *internal* social policies and positive (or negative) employee engagement.
  - o Speak to knowledgeable employees (i.e., human resources professionals), obtain employee feedback, and engage in internal discussions.
  - o Has there been any positive or negative publicity for the company or the property in relation to any such internal items? Are there ways to increase the positive publicity?
  - o Evaluate what works and any shortcomings.
- Determine and document any *external* social policies and positive community and external engagement.
  - o Has there been any positive or negative publicity for the company or the property in relation to any such external social policies? Are there ways to increase the positive publicity?
  - o Evaluate what works and any shortcomings.
  - o Determine whether any of the existing external social policies and procedures are being measured. Can they be?
- Consider whether there are any gaps in the existing policies and procedures.

**What Are Internal and External Facing Social Goals**

What are the company's goals for internal and external relationships and people matters? This may be influenced by:

- Requirements of relevant stakeholders (e.g., investors, board of directors, corporate policies)
- Employee expectations and talent retention
- Brand and media relations for the company or the property
- Any applicable legislation (though there is currently less in the social area than in the environmental context)
- Causes or community needs that are important to the company (or real estate) and, if there are any, how they fit into the company's business objectives

**Social Policies**

After assessing the existing social policies and social goals, the company can craft social policies that build on, change, or address gaps in the existing policies to further social goals. This may include taking the following actions:

- Determine the scope of new policies to address goals and how they fit in with the existing policies.
- Set measurable standards and achievements and periodically evaluate the same as well as internal and external satisfaction with the same. Although social policies and goals may be harder to measure than environmental matters, metrics could include:
  - o Setting a certain number of volunteer hours or amounts of monetary contributions
  - o Internal satisfaction surveys
  - o Required percentage of compliance or participation with policies or initiatives (such as reverse mentoring) –and–
  - o Increased diversity and inclusion
- Create ways to document future social initiatives internally and externally

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- Publicize social efforts, including any that are specific to the real estate industry (such as diversity/inclusion, equality, philanthropy, and corporate culture)

### **Governance**

Like social factors, governance factors are harder to quantify than environmental factors and are also less real estate specific. Governance factors include leadership and management matters including policies, controls, shareholder rights, conflicts of interest, board structure, management, ownership, executive compensation, risk matters, and codes of conduct. In evaluating and creating the "Governance" aspects of ESG guidelines, consider (1) what governance policies and procedures the company already has in place (generally, or specific to a particular real property), (2) any internal and external governance goals, and (3) using these goals to refine existing policies and procedures.

#### ***What Governance Policies/Procedures Exist***

When thinking about the governance part of ESG, a good initial step is to assess what governance related policies and procedures the company already has in place (generally, or specific to a particular real property). This may include the following:

- Determine and document any existing governance policies and practices:
  - o Which individuals ultimately control day-to-day decisions for the company (and any applicable real property)?
    - Is it one person or a group? Are these persons elected or appointed?
    - Are there any guardrails around such control or any removal rights?
    - Can this be changed?
  - o Who ultimately controls appointing such persons and controlling major decisions for the company and the applicable real property?
    - Is it one person or a group? Are these persons elected or appointed?
    - Is it the same group as for day-to-day decisions or a different group?
    - Can this be changed?
  - o Are there policies or procedures for conflicts of interest or related party transactions?
  - o Are there regular shareholder and/or board meetings?
  - o How is risk considered and mitigated? Who has control of such matters? What is the scope of risks considered?
  - o How is executive compensation determined?
  - o Are there any codes of conduct or other expectations for employee behavior? Who has the authority to enforce these?
- Are any of the existing governance policies and procedures being measured? Can they be?
- Are there any gaps in the existing policies and procedures?

#### ***What Are Governance Goals***

After evaluating the governance status quo, evaluate any governance goals the company may have. Consider the following potential influences:

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- Are there requirements of relevant stakeholders (e.g., investors, board of directors, corporate policies)? For example, in a joint venture agreement, an investor may have certain governance requirements for the sponsor or the real property.
- Are there any other external factors restricting or prescribing certain governance (i.e., change of control restrictions in loan documents or leases, SEC rules, etc.)?
- Identify any gaps in the existing governance procedures.
- Consider any applicable legislation (though there is currently less in the governance area than in the environmental context).

### **Governance Policies**

After evaluating the current governance policies and setting goals with respect thereto, the company can reaffirm or change governance policies and, to the extent needed, address gaps in the existing policies to further governance goals. This may include the following actions:

- Determine the scope of new policies to address goals.
- Set measurable standards and achievements and periodically evaluating them as well as the internal and external satisfaction they generate.
  - o Like social matters, governance matters may be harder to measure than environmental matters. Measurable matters could include (depending on the social goal):
    - Implementing certain policies (like a conflict of interest policy) by a particular date
    - Establishing and periodically evaluating governance guardrails –and–
    - Holding board or shareholder meetings on a regular schedule
  - o Note that Harvard University has created the "G index" to measure governance policies which could be a potential metric to consider.
- Create ways to document governance policies, measure compliance, and periodically evaluate effectiveness.

### **Looking Ahead**

In conclusion, ESG matters have become increasingly more important and even polarizing in the United States. Given the special role the real estate sector plays in ESG, it is a time for individuals and companies in the real estate sector to put policies and guidelines in place regarding adaptation and measurement of ESG. This is especially true, given the increased role of legislation (both pro- and anti-ESG), ESG requirements and procedures being imposed by various counterparties (banks, insurance companies, etc.), and the increasing role of ESG in executive compensation, where executives are increasingly seeing a portion of their remuneration tied to ESG matters.

ESG is a complicated topic. Attorneys familiar with its principles and applications can add value to many aspects of their clients' businesses, including economic efficiencies, enterprise and asset financeability, efficient and equitable governance, and community integration.

Companies with strong and apparent ESG values make for desirable employers, partners, and neighbors everywhere. The authors hope that this article can help attorneys and companies in the real estate space think about the amorphous concept of ESG and how they might incorporate ESG into their businesses.

### **Related Content**

#### **Resource Kits**

ESG Guidelines: A Framework for ESG Considerations in the Real Estate Space

- [Environmental, Social, and Governance \(ESG\) Resource Kit](#)
- [Energy Real Estate Resource Kit](#)
- [Public Accommodation, Building, and Website Accessibility Resource Kit](#)

**Practice Notes**

- [Environmental Impact Review in Real Estate Transactions](#)
- [Green Leasing](#)
- [REITs as a Financing Source for Renewable Energy Projects](#)
- [Solar Energy Project Development](#)
- [Wind Energy Leases and Related Agreements](#)

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