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Real Estate Caught In ESG Tug Of War

By **Georgia Kromrei**

Law360 (April 2, 2025, 11:39 PM EDT) -- In the early aughts, before ESG took hold, companies navigated a fractured landscape to understand environmental, social and governance risks that, while not financial, could hurt the bottom line.

"There would be one questionnaire on human rights, a separate one on cybersecurity. Companies were peppering clients for information," said Suz Mac Cormac, a San Francisco partner at Morrison Foerster and co-chair of its ESG practice.

In the 20-plus years since, the umbrella of ESG has grown to cover topics ranging from climate risk to cybersecurity and diversity practices in hiring. The concept, according to Mac Cormac, got "completely diluted."

Environmental, social and governance requirements have seen both pushback and encouragement over the years, with firms constantly navigating the changing political and economic landscape surrounding ESG. (iStock.com/Liliya Filakhtova)

Things were lumped into ESG that were not necessarily relevant to a specific business: A software developer creating an application might have an excellent ESG rating because of their minuscule carbon footprint, compared to a manufacturing company with a relatively large one.

"At the height of that bubble, there was a rush to make sure you had green or social bonds in your mix, and there was a premium on pricing that was not necessarily correlated with economic performance," said Shelli Willis, a partner at Troutman Pepper Locke who regularly counsels public and private companies on ESG matters.

In recent years, a growing anti-ESG backlash has taken aim at the issue. In the last seven years, state officials have taken 53 different actions — from threatening lawsuits to withdrawing state funds from asset managers viewed as having ESG exposure — according to Pleiades Consulting, which tracks anti-ESG policies.

Most recently, a string of executive orders from the Trump administration have punctuated the anti-ESG backlash, by rescinding Biden-era diversity, equity and inclusion and climate orders, directing federal agencies to go after companies that engage in DEI practices, removing DEI staff from agencies and barring agencies from DEI work. Days after the executive orders, 10 state attorneys general warned financial institutions of enforcement actions for ESG or DEI activities.

Parts of Trump's executive orders have been challenged and in some cases blocked. At the same time, some states are doubling down on regulation seen as encouraging ESG — notably California, where large companies will have to make climate disclosures starting next year.

While legal challenges to the administration's policies continue, its actions toward DEI are already having an effect in the business world. Attorneys say that real estate companies are immediately adjusting their language, both to escape notice by regulators and to appeal to investors with ESG qualms. Companies are also making sure their ESG practices make financial sense, and weighing the risk of operating in jurisdictions that are pro- or anti-ESG.

"I'm seeing more clients trying to separate the wheat from the chaff," said Mac Cormac. "They're saying, let's understand how these elements together affect our operations, our risk and our profitability."

It's About the Bottom Line

There is sometimes a clear business rationale for measures that also happen to be sustainable or otherwise aligned with ESG principles.

"In some cases the financial story for sustainability is really there, and it's helpful for the bottom line, while in other cases it takes some effort to get and keep people interested, and make sure deals pencil with the sustainability measures they want to include," said Susan M. Rainey, an environmental partner at Troutman Pepper Locke.

Energy and water management, tenant sustainability and climate adaptation are the relevant ESG factors for real estate, according to global accounting standards. Sustainability has become especially important in the hospitality, office and data center sectors.

Matthew Peters, a London-based special counsel in Cadwalader's real estate practice, explains that consumers are willing to pay a premium for features that are marketed as environmentally friendly.

"You look at the One Hotel in Miami, the One Hotel in New York — these are great hotels, and people love them and love the environmental aspect of them — but these hotels are expensive hotels," said Peters. "They're not 'environmentally friendly and therefore cheaper,' they're expensive, and people are prepared to pay because they like it."

The office sector, too, has embraced sustainability. A 2023 report from commercial brokerage JLL found that demand for low-carbon offices would outstrip supply by the end of the decade. High-end office buildings typically include amenities with an eye toward sustainability, which appeals to tenants.

"If your building is efficient, you're demonstrating cost savings to your tenants, and that's attractive to them," said Fred Gallo, a real estate partner at Morgan Lewis & Bockius LLP.

Renewable energy is also a major priority for companies that focus on data centers, due to the extreme increase in energy demanded by generative artificial intelligence. That priority is not expected to shift, even with regulatory pressure on ESG.

The data center sector's appetite for renewables and alternative energy sources "doesn't get the targeted light bulb of 'ESG, therefore bad,' because nobody can question the extreme demands we have for energy now," said Willis.

Given its clear business rationale in some sectors, attorneys advising real estate companies say that, in the near term, real estate companies are not abandoning ESG. They have, however, been avoiding ESG buzzwords in financial disclosures. Companies are not necessarily changing their sustainability practices, but they are describing them differently in order to draw less attention from regulators, a practice that is sometimes called "green-hushing."

"There's been a real scrubbing of the most offensive words, but not necessarily a change in behavior, or all of the things that make diversity, in its broadest sense, a smart business decision," said Willis.

Some of the descriptions were vague to begin with, or didn't belong under the umbrella of ESG, which could fall in and out of political favor.

"Maybe it shouldn't have gone under the heading of ESG, anyway," said Mac Cormac.

Real estate companies that have an ESG focus are also fine-tuning their language to appeal to investors that are sensitive to ESG exposure.

"To the extent you can avoid using certain terms that might be 'woke' or challenged under a DEI concept, if you can bland out the language, it might give investors a little more comfort," said Gallo.

Some pension funds are barred by state law from investing in funds that focus on sustainability and ESG, making it difficult for asset managers to raise money in some jurisdictions. Adjusting the language helps those investors remain compliant.

"We've seen many asset managers be able to raise money in those jurisdictions just by changing terminology, because they're really talking about risk, or elements of ESG that they don't call ESG, that drive returns," said Mac Cormac.

Anti-Backlash Whiplash

The backlash against ESG is not proceeding uniformly across regions, states and jurisdictions, which poses a problem for companies with a larger geographic reach.

In California, starting in 2026, companies making more than $1 billion in gross annual revenue will have to disclose the scope of their emissions for their operations and supply chains. A separate law will require companies making more than $500 million to report on their climate-related financial risks every two years.

Some companies are concerned that, if they are required to disclose their climate-related risks in one jurisdiction, they could get penalized for it in another.

"The rubber hits the road if you are required in California to disclose and you get in trouble in another state if you do disclose," said Mac Cormac. "What do you do? There's not a good answer to that."

The details of the legislation's implementation have not yet been published, but are expected sometime this summer, said Jacob H. Hupart, a litigation member and co-chair of the ESG practice group at Mintz Levin Cohn Ferris Glovsky and Popeo PC.

The lack of uniformity among jurisdictions — whether they are taking a pro- or anti-ESG approach — may well provide a path forward for companies to operate across state lines while staying out of the cross-hairs of regulators.

Texas, for example, has penalized financial institutions considered to be boycotting the oil and gas industry. Some states have excluded financial institutions from municipal bond offerings, or barred state funds from investing based solely on ESG criteria.

"Folks often classify jurisdictions as anti or pro-ESG, but the various ways the ideological bent can be expressed are quite different," said Hupart. "While there are areas where there are direct conflicts, there's also a substantial gray zone where companies can operate in multiple jurisdictions on both pro and anti-ESG slides of the spectrum without running afoul of particular laws."

--Editing by Jay Jackson Jr. and Emily Kokoll.
