

The FYI on ESG: Not your average acronym

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By now, ESG, i.e., environmental, social, and governance factors, should not be a new concept to attorneys, having taken on new prominence in recent years in the corporate and finance sectors. Tempting though it may be to dismiss it as the new buzzword for corporate sustainability, it is much more than that, and attorneys must understand what it is and what it means for their practice.

ESG in a nutshell

The term “ESG” entered the lexicon in the early 2000s, when the United Nations Global Compact initiative produced a report entitled “[Who Cares Wins](#),” which provided recommendations on including ESG factors in financial analyses and securities services. In the investment world, ESG can be thought of as a logical evolution of “socially-responsible investing,” the underpinnings of which [date back centuries](#). So, while this is by no means a new concept, as globalism has made us all increasingly aware of the interconnections among business, the environment, and human rights, these factors have taken on an unprecedented level of importance.

ESG factors can seem ephemeral and hard to quantify, but they correspond to real-world aspects of business operations, including the environmental and social impacts of a company's supply chain and procurement activities (E/S); the success of a company's efforts to transition to renewable energy or otherwise reduce its carbon footprint, or lack thereof (E/G); and a company's board ethics, compensation structures, and labor practices (S/G). ESG consideration thus offer businesses significant opportunities to demonstrate leadership in their industries, but they can also spotlight existing financial, compliance, and reputational risks.

How attorneys fit in

Whether an attorney works in private practice, for a governmental agency, in-house, or at a nonprofit organization, a matter with ESG implications will no doubt arise in their practice at some point in the near future. ESG is likely to have a particularly large role—and highlight

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the overlap—in the areas of corporate disclosure, public relations and advertising, labor and employment, and environmental enforcement.

The analysis of ESG factors began in the finance sector, as lenders and investors sought new ways to quantify risk. In an attempt to standardize this analysis, numerous organizations, supported by government finance officials, corporations, and nonprofit entities, have devised voluntary reporting frameworks. The frameworks vary in content and structure, some focusing on the [financial implications of climate change](#), others attempting to be more [comprehensive](#). As these frameworks have multiplied, so has the demand for international, federal, and state regulators to level the playing field with uniform, nonvoluntary standards. Progress on this front has been uneven—while the European Union promulgated binding requirements for increased [transparency in ESG funds](#), the United States under the Trump administration promulgated a rule [prohibiting the consideration of ESG factors](#) in employee-benefit plan investment selection (which the Biden administration has already [signaled it will not enforce](#)).

The precise effects and implications of these new rules are as yet unclear. But whether voluntary or compelled, corporate, environmental, and labor and employment attorneys must be aware of these frameworks to be able to assist their clients in evaluating and advising on the benefits and risks of whatever a company determines it will (or must) disclose to the public or to regulators, because ESG disclosures provide not only an opportunity to highlight a company's successes, but also open a company's practices, products, and services to scrutiny from investors and insurers, regulators, and the public. Conversely, attorneys in the government and nonprofit sectors should be prepared to advise their clients about what such disclosures imply about a company or industry that may be, for better or worse, an enforcement target.

Shareholder activism and disclosure compliance are just the tip of the iceberg in terms of ESG enforcement risks. How a company publicizes its operations, including performance on ESG metrics such as carbon-neutrality or “zero-carbon” emission claims, can provide an opening for false advertising complaints. Likewise, supply-chain and procurement transparency can prompt investigations into potential human-rights and environmental violations. Therefore, attorneys whose bailiwick is environmental compliance and enforcement, for example, now need also to consider the social and governance implications of their work—which can be of existential importance for their clients—and be ready to consult with attorneys in other practice areas to ensure that all implications of a public statement are considered.

Apart from advising a *client* on its ESG concerns, attorneys, primarily those in private practice, must recognize that they are service providers who may also be audited for their own ESG performance as part of a client's supply chain. For-profit and nonprofit organizations

alike must be ready to lay their ESG metrics bare and show clients they practice what they preach.

But the rise of ESG is not all bad news. Attorneys can play a vital role in assisting forward-thinking companies in positioning themselves as leaders in their industries and as attractive investment targets for lenders and equity investors. Internal ESG policy review and improvement can foster a more inclusive, collaborative, and resilient workforce, redounding to the benefit of the company. And attorneys in public service have an opportunity to help shape how ESG policy unfolds in the coming years.

Conclusion

In sum, ESG is not simply the latest trend, and it is not likely to recede in importance anytime soon. To the contrary, in just the first few months of the Biden administration, ESG has been elevated to the forefront of several agencies' policymaking agendas, including the [Department of Labor](#), and the [Securities and Exchange Commission](#). Since ESG combines aspects of several different practice areas, cross-practice thinking and collaborative analysis among attorneys will be key to client service, whether the client is a company, a nonprofit organization, or the public.