Proskauer

Risk #4: Five Guidelines for ESG Disclosures in 2026: Choose Your Words Carefully

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Choose your words carefully because careless words cost.

Never has this been more true than in disclosures about environmental, social and governance matters. As divergence between the US federal government and "red states" on the one hand, and the UK, EU, and certain US "blue states" on the other hand, solidifies, international asset managers and their underlying portfolio companies must navigate an increasingly narrow regulatory tightrope.

To do so, each word must be considered and its exact meaning understood. This starts with…

1. ***… Knowing your regulators***

Asset managers with a nexus in both the US and the UK/EU must consider the language appetite of all applicable regulators. The challenge is to discuss accurately – without understating ("greenhushing") or overstating ("greenwashing") – the centrality of green investing to a fund's investment thesis. This includes:

- US: Within the US disclosure and reporting context, certain concepts such as "DEI" (Diversity, Equity, and Inclusion) and ESG are politically charged, with "sustainability" increasingly being preferred. While enforcement actions against asset managers have focused on incomplete disclosers, as opposed to ESG or DEI practices themselves, increasing political sensitivity and scrutiny surrounding these concepts makes careful and precise positioning crucial.
- EU: Although the EU has the longest established sustainable finance and corporate sustainability reporting frameworks, these are under review and being overhauled with concepts such as "sustainable investments" and "transition" assets now in flux. Notwithstanding this uncertainty, national regulators have been called on by the European Supervisory and Markets Authority to enforce and supervise on the Sustainable Finance Disclosure Regulation (SFDR).

- UK: The UK's sustainability disclosure requirements are out of scope unless certain UK regulatory permissions are held, and at fund-level are opt-in for private markets funds. The UK's HM Treasury shelved the proposed UK Green Taxonomy in July 2025, concluding it was not the most effective tool to support transition to a low carbon economy. The UK's focus is therefore principle-based with an anti-greenwashing rule in place driving at ensuring sustainability-related statements are both correct and substantiated.

In short, this means wherever you operate, you need to …

- ***… Say it as you mean it***

Recent enforcement actions illustrate the risks of imprecise or overly ambitions language.

The first ESG-related fine by the Luxembourgish regulator, Commission de Surveillance du Secteur Financier (the CSSF), concerned an "Article 8" SFDR fund of Aviva, finding that the defined strategy to exclude certain assets was not effectively applied, and sustainable development goals were not targeted as disclosed in the fund's prospectus.

In the same way:

- In November 2024, the SEC fined Invesco Advisers $17.5 million after finding the firm misrepresented the proportion of assets under management that were "ESG-integrated," including passive funds that did not in fact employ ESG criteria.
- In March 2025, the Danish Financial Supervisory Authority criticised three Article-9 SFDR funds for "significant shortcomings", finding processes failed to ensure investments genuinely contributed to environmental/social objectives, properly assessed principal adverse impact indicators or applied robust "do-no-significant-harm" or good-governance criteria, thus undermining the sustainability status claimed under SFDR.
- In April 2025, Deutsche Bank's asset manager, DWS, was fined €25 million by the Frankfurt Public Prosecutor's Office after a long running investigation for significantly overstating the fund's green credentials.

To guard against loose language and overexuberance in statements, it is therefore advisable to …

- ***… Build your own dictionary***

Building out an in-house definitions bank is an effective way to heighten precision when ESG statements are made. Utilizing such a resource can ensure that whenever a defined term is used, whether in a legal document or an investor relations publication, it has, and is understood by all, to have a common meaning. A manager is easily able to explain clearly and confidently what is meant by any reference (for example to a “transitory asset”) and so can address regulatory scrutiny in short order.

To understand the relevant standard or threshold to which their carefully defined terms must speak and conform, managers need to …

- ***… Know the requirements***

As legislators and regulators continue to build and refine ESG relevant laws and rules, reports of their content, in the press or political discourse, can easily become exaggerated and inaccurate.

Titles of US laws can also often be misleading and the true content can be highly nuanced. Public pension funds in states with anti-ESG statutes are often not categorically barred from investing in Article 8 funds - whether such an allocation is permissible generally turns on the specific state law’s interpretation of fiduciary duties, definitions of pecuniary factors and scope of anti-boycott legislation. For example, some laws specifically define and treat ESG factors as nonpecuniary with no exception (and thus a disallowed consideration in investment decision-making). However, many anti-ESG laws as enacted, include “escape clauses” allowing ESG / DEI / “sustainability”-related investing if the restrictions would reasonably impact financial risk and return.

Equally, the EU’s new SFDR 2.0 (the proposed amended Sustainable Finance Disclosure Regulation) is designed to simplify sustainability disclosures in the EU. The concept of a “ESG Basics” fund is designed as the lowest category of ESG commitments for a fund, but even this seeming entry level standard has mandated exclusionary criteria, including with regards to hard coal and lignite. This appears to have been a last-minute addition as it was not visible in the version of the proposal leaked a few weeks before its formal publication. Even an “ESG Basics” fund could then be off-limits to certain investors who apply, or are required to apply, anti-boycott rules preventing the restriction of investment in fossil fuels.

If managers choose not to categorize their fund as “ESG Basics” (and under SFDR 2.0 then severely restrict what they can disclose on ESG) they must still …

- ***… Beware commitments by the side door***

Under the current SFDR 2.0 proposal, funds not in scope face strict limits on how much of any prospectus or disclosures may be devoted to ESG issues (by any name).

In such cases, with ESG matters already often heavily negotiated in side letters, this will only be set to increase. Absent any standardized expectations in place, investors have their own specific demands. These are unlikely to be consistent – compare, for example, the typical asks of each of a Dutch and a Floridian pension fund. This inevitably creates additional challenges for a manager in tracking and complying with a network of different obligations, and the web of potential contractual claims arising, as sustainability may be pushed into the shadows.

To conclude, remember: clarity is strategy

In 2026, ESG is no longer just a disclosure issue — it is a legal and jurisdictional one. The same sustainability-related term can carry different regulatory consequences depending on where it is read and by whom.

Precision is therefore not cosmetic; it is protective. Managers who understand what the applicable law actually requires—and where flexibility truly lies—are far better positioned to withstand regulatory and investor scrutiny. Those who rely on shorthand or market rhetoric risk unintended exposure and added friction in fundraising.

The objective is simple: communicate exactly what you mean, ensure it aligns with your underlying practices, policies, and procedures, and be prepared to understand - and address- the nuances in your investor base’s views.

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*Proskauer's **ProTrack: U.S. State ESG Investment Law** is a new legal technology tool by subscription that provides state-by-state visibility on investment law requirements, pro-sustainability and anti-sustainability positions, and common side letter themes. The tool helps managers shift from reactive negotiations to deliberate strategy-setting, reducing friction in fundraising and negotiations by addressing sustainability considerations early and preventing them from impeding fundraising efforts. For further information please reach out to protrackesg@proskauer.com or any of the authors.*

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