

# Remedying Green Nonperformance

John Patrick Hunt, Professor of Law  
U.C. Davis School of Law (King Hall)  
jphunt@ucdavis.edu

## ABSTRACT

Green bonds are a rapidly growing segment of the bond market. Their issuers state an intention to use bond proceeds for environmental investment. But U.S. corporate green bonds generally do not offer contract remedies for failure to use proceeds as stated (for “green nonperformance”). The gap may help explain why investors do not pay more for green bonds than for non-green equivalents, so green bonds may not be attracting additional capital for green transition. This article presents the first full-length analysis of contract remedies for green nonperformance.

The article examines three leading approaches to green-bond contract remedies. The most straightforward would be to promise green performance as a bond covenant. Upon uncured breach of the covenant, the bond’s indenture trustee could declare an event of default and accelerate the bonds—declare all the bonds’ principal due and payable immediately. This collective approach does not fully protect green-minded investors. For example, acceleration is only sometimes financially attractive. Financial investors thus may at times oppose acceleration where green investors want it, depriving the green investors of a remedy. And issuers resist adding a green event of default because it could trigger cross-default clauses.

A second approach would be to make green nonperformance a “put event,” giving bondholders the individual right to sell the bond back to the issuer. A third would be a “step-up,” an increase in the bond coupon or principal triggered by green nonperformance. Both put events and step-ups are familiar to the bond market and both avoid the creation of an event of default. Both also have drawbacks. For example, the put does not compensate the investor for loss caused by green nonperformance, and the step-up does not allow the investor to exit the investment.

In standard contracts, upon total breach the injured promisee may elect between restitution and expectation remedies. By analogy, green bondholders arguably should have the right to choose between exercising a put (restitution-like relief) and receiving the step-up (expectation-like relief). If just one remedy must be chosen due to issuer reluctance, the step-up is arguably better suited for a first, incremental step because it is easily tailored by adjusting its amount.