

# THE BOND BUYER

## SEC's Sanchez offers guidance on ESG

By

[Connor Hussey](#)

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Issuer fears that ESG regulation will lead to disclosure trouble are overblown, the Securities and Exchange Commission's muni office chief said Wednesday.

Dave Sanchez's comments were part of the National Federation of Municipal Analysts' 2022 Annual Conference, where panelists spent considerable time discussing the recent ESG initiatives underway at the SEC and Municipal Securities Rulemaking Board.



"It's not a violation of securities law to say you're not going to do anything [on ESG], that you're going to stick your head in the sand," said Dave Sanchez, director of the Office of Municipal Securities. "Maybe nobody will buy bonds, but you have not committed to anything," he added. "There's no mandate to do something, you'll just have to describe what you're doing."

Sanchez addressed industry concerns that any disclosure regime centered around ESG will be an exercise in over-disclosure.

The SEC's 2020 guidance on voluntary disclosures related to COVID-19 has received mostly positive marks from the market, but the Commission may be considering expanding some of the provisions on cautionary language going forward.

"We lean heavily on the 2020 SEC statement from the chair and the director of the Office of Municipal Securities talking about cautionary language about your disclosure," said Emily Brock, director of the federal liaison center at the Government Finance Officers Association. "Always very glad to hear Dave mention that there is thinking at the SEC about maybe expanding that information beyond COVID-19 disclosures."

Panelists also used their time to work through how regulators, investors and issuers handle materiality.

"As a practitioner, I kind of always thought of it as like you're trying to cross a river from the information you're holding to disclosing it and there's really one rock in the middle and that's materiality," Sanchez said. "Part of the job of the SEC really is to provide additional touch points in different contexts that help people get across the river to actually disclose this information."

Panelists agreed that some issuers feel they have the right to define materiality on their terms, which is not the standard as defined by the SEC.

"As a former issuer myself, I actually think I suffered from a misunderstanding of securities law as I thought I got to define materiality," said Mark Kim, chief executive at the MSRB. "It's the investors decision to make."

The Supreme Court has ruled that information is material if it would matter in the investment decision of a reasonable investor.

"It's not really in the eye of the beholder," Sanchez said. "There is a standard, it has to be reasonable investors, it's not any investor."

But Sanchez ultimately believes that ongoing dialogue with underwriters, bond counsel or others around materiality, and if it's well-documented, will provide some protection from the SEC.

“If you have a good-faith discussion about whether something is material or not, that ends up providing a lot of protection under securities laws,” Sanchez said.

The MSRB’s controversial request for information on ESG also served as an important pillar for the discussion. Kim expressed that he was surprised by comments that questioned why the MSRB was asking these sorts of questions, when he thought market participants would be asking why the board didn’t do this sooner.

Kim compared the ESG RFI to the RFI issued in 2018 on third-party yield curves, which is still a concern that persists today.

“While I’ll be the first to admit that we have absolutely no regulatory authority over third-party vendors that are offering yield curves and benchmarks to the industry, we do have the responsibility to ask that question,” Kim said.