

Legal Update

SEC Adopts Rules to Facilitate Electronic Submission of Documents

The US Securities and Exchange Commission (SEC) has amended Regulation S-T and the EDGAR Filer Manual to permit the use of electronic signatures for filings on EDGAR that are required to be signed and has made corresponding revisions to various rules and forms under the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Company Act of 1940.¹ These amendments will become effective upon publication of the adopting release in the *Federal Register*.

Background

Currently, Rule 302(b) of Regulation S-T requires that each signatory to an electronic filing *manually* sign a signature page or other document (an authentication document) before or at the time of the electronic filing on EDGAR to authenticate, acknowledge or otherwise adopt the signature that appears in typed form within the electronic filing. In March 2020, SEC staff provided temporary relief from the requirement for the filer to obtain manual signatures in advance of filing in light of COVID-19.² Thereafter, the SEC received a rulemaking petition requesting that electronic signatures be permitted when executing authentication documents under Rule 302(b) due to their widespread use and related technological developments.

Amendments

As amended, Rule 302 allows for manual signatures or electronic signatures on EDGAR filings.

Before a signatory initially uses an electronic signature to sign an authentication document, amended Rule 302(b) requires the signatory to *manually* sign a document attesting that the signatory agrees that the use of an electronic signature in any authentication document signed thereafter constitutes the legal equivalent of such individual's manual signature for purposes of authenticating the signature to any filing for which it is provided (an initial electronic signature authentication document). The electronic filer must retain this manually signed document for as long as the signatory may use an electronic signature to sign an authentication document and for a minimum period of seven years after the most recent electronically signed authentication document. Upon request, the electronic filer must furnish a copy of such manually signed document to the SEC or its staff.

In conjunction with the amendment of Rule 302(b), the SEC adopted an updated EDGAR Filer Manual to set forth the required process to be followed for electronic signatures on documents

filed with the SEC via EDGAR.³ When a signatory signs an authentication document using an electronic signature, the signing process must at a minimum:

- require the signatory to present a physical, logical or digital credential that authenticates the signatory's individual identity;
- reasonably provide for non-repudiation of the signature;
- provide that the signature be attached, affixed or otherwise logically associated with the signature page or document being signed; and
- include a timestamp to record the date and time of the signature.

Electronic filers must retain the authentication document for a period of five years and furnish a copy of it upon request to the SEC or its staff.

In accordance with amended Rule 302(a), required signatures to, or within, any electronic submission must be in typed form. In connection with an electronic filing, the term "signature" means a computer representation of any symbol or series of symbols comprising a name executed, adopted or authorized as a signature.

In a related development, the SEC also adopted rule amendments to require electronic filing and service of documents in administrative proceedings, with redaction of sensitive personal information from many of these documents before filing with the SEC.⁴ These amendments will become effective 30 days after publication of the adopting release in the *Federal Register*, but compliance will not be required until April 12, 2021, and there will be an initial 90-day phase-in period following the compliance date.

Practical Considerations

The ability to use electronic signatures for periodic and current reports and registration statements filed through EDGAR, including the CEO and CFO certifications in Forms 10-K and 10-Q, is a welcome development, especially with remote working becoming more prevalent and electronic signatures gaining acceptance in many other contexts.

Filers who want the flexibility of using electronic signatures for SEC filings need to be sure they have proper procedures in place before submitting electronic signatures through EDGAR. In particular, filers must obtain manually signed initial electronic signature authentication documents from signatories in advance, attesting that they agree that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual's manual signature. Filers should consider obtaining such manually signed documents as soon as possible from anyone likely to electronically sign their SEC filings.

Filers should review the technological requirements of the electronic signature process to be sure they have systems in place that meet each of the specifications of the amended rule. For example, the signing process must provide the signatory with notice of the nature and substance of the document and an opportunity to review it before signing by associating the signature logically with the signature page or document being signed. In addition, the electronic signature should be linked to the signature page or document in a manner that allows for later confirmation that the signatory signed the signature page or document.

The SEC intends for its electronic signature signing requirements "to be technologically neutral and allow for different types and forms of electronic signatures, provided that the signing process satisfies a number of conditions that relate to the validity and enforceability of an electronic signature." Filers should determine what authentication procedures will work best for them in compliance with the new requirements.

Filers need to recognize that a signatory still must execute an authentication document in accordance with the SEC's new rules by the time an electronic filing is made. In this regard, note that the electronic signature process must include a timestamp that records the date and time of the electronic signature.

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Endnotes

¹ See <https://www.sec.gov/rules/final/2020/33-10889.pdf>.

² See <https://www.sec.gov/corpfin/announcement/rule-302b-regulation-s-t-covid-19-update>.

³ See <https://www.sec.gov/info/edgar/specifications/edgarfm-vol2-v55.pdf>, Section 5.1.2 (Statutory Signatures).

⁴ See <https://www.sec.gov/rules/final/2020/34-90442.pdf>.

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