

SEC to Permit Electronic Signatures in Filings

November 20, 2020

Recognizing the burden of requiring manual signatures and the widespread use of electronic signatures today (particularly in this work-from-home environment), this week the SEC **amended** its rules to permit electronic signatures on documents submitted to the SEC through EDGAR, as long as certain procedures are followed. These amendments represent a significant change by the SEC, which has been a laggard in permitting e-signatures, and follow the limited relief related to manual signature requirements provided by the SEC in March due to COVID-19-related circumstances. We expect these amendments will significantly expedite the process for collecting signatures on documents such as Exchange Act filings, CFO/CEO certifications, Section 16 filings, and registration statements.

In a separate **statement** this week, the staff of the Division of Corporation Finance (the “Staff”) temporarily granted relief regarding the authentication document retention requirements due to circumstances arising from COVID-19.

The new rules become effective when published in the Federal Register, which we expect to happen in the coming weeks. However, the Staff has stated that it will not recommend enforcement prior to effectiveness as long as the filer fully complies with the amended rules. At this time, registrants should consider asking each of their regular signatories to manually sign the attestation document that will be required to take advantage of the electronic signature rules.

Highlights

Pursuant to the new rules:

- a signatory will have the option to sign a signature page manually or electronically;
- when signing electronically, the signing process must follow certain procedures; and
- manual attestation will be required the first time a signatory uses an electronic signature to sign an “authentication document” (as defined below).

Electronic Signature Procedures

Current Rule 302(b) of Regulation S-T requires each signatory to an EDGAR filing to manually sign a signature page or other document (an “authentication document”) before or at the time of the electronic filing. The filer must retain the signed authentication document for five years and provide a copy to the SEC upon request.

Under the new Rule 302(b), a signatory will have the option, in lieu of a manual signature, to sign an authentication document electronically, as long as certain procedures are followed, including that the electronic signature meets specified requirements in the revised EDGAR Filer Manual.

Pursuant to Section 5.1.2 of the revised EDGAR Filer manual, the signing process requires:

- Authentication of the signatory: The signatory must present a credential that authenticates his or her individual identity. These credentials may be physical, digital, or logical.
 - Examples of authentication are a driver’s license (physical), passcode (digital), or a credential chip on a workplace ID (logical).

- Non-Repudiation: The signing process must reasonably provide for “non-repudiation” (assurance that the signatory cannot falsely deny having signed the document) of the signature.
 - This is typically provided by the e-signature platform and may include the use of a digital signature combined with public key encryption.
- Association of signature: The signature must be attached, affixed, or otherwise “logically associated” with the signature page or document being signed.
 - This requirement means that the signature page must be attached to the document to be signed (in a manner that can be confirmed later) and the signatory must be able to read the document prior to signing.
- Timestamp: The signing process must include a timestamp to record the date and time of the signature.

While we expect that some e-signature platform providers will comply with the requirements outlined in the EDGAR Filer manual, we recommend that filers confirm that their e-signature provider is compliant with each of these specifications.

The existing requirements of Rule 302(b) will remain otherwise unchanged, including the requirement that the filer retain the authentication document for five years.

The term “electronic signature” is defined in the EDGAR manual as “an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” While this definition is substantially similar to that in the E-SIGN Act, the SEC has noted that the E-SIGN Act does not apply to its requirements related to authentication documents. We believe, for example, that signing an electronic device or clicking a checkbox of an associated document would show the necessary intent to sign the document, but the signing process would still need to satisfy the other requirements outlined above.

Manually Signed Attestation Requirement

Before a signatory initially uses an electronic signature to sign an authentication document, new Rule 302(b) will require the signatory to manually sign a document attesting that he or she agrees that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual’s manual signature. The filer must retain this manually signed document for as long as the signatory uses an electronic signature to sign an authentication document and for at least seven years after the date of the most recent electronically signed authentication document. An example of an initial attestation document is attached to this memo as an exhibit.

Pursuant to the temporary relief issued by the Staff, enforcement action will not be recommended with respect to the manual signature retention requirements of new Rule 302(b), as long as:

- the signatory retains a manually signed signature page of the authentication document and provides it (for example, by sending a photo), as promptly as reasonably practicable, to the filer for retention;
- the authentication document has a date and timestamp; and
- the filer establishes and maintains policies and procedures governing this process.

The Staff has indicated that it will provide at least two weeks’ notice prior to terminating the temporary relief.

Next Steps

In order to have the flexibility to use electronic signatures for SEC filings (including CEO and CFO certifications), filers should consider having any signatory manually sign the required attestation document prior to the time of filing. The filer should also review and confirm that their electronic signature software, and related procedures for signing, comply with the requirements set forth in the EDGAR Filer manual, as discussed above.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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FORM OF INITIAL ATTESTATION FOR ELECTRONIC SIGNATURES

(To Be Completed Before Use of Electronic Signatures to Authenticate SEC Filings Pursuant to Rule 302(b)(2) of Regulation S-T)

This attestation is provided to **[name of registrant or other electronic filer]** in connection with its use of my electronic signature to authenticate and adopt my typed signature appearing on filings with the U.S. Securities and Exchange Commission.

I, **[name of individual who will be electronically signing SEC filings]**, certify that: when using my electronic signature for purposes of signing a signature page or other document authenticating, acknowledging, or otherwise adopting my signature that appears in typed form within an electronic filing pursuant to Rule 302(b)(1) of Regulation S-T under the Securities Act, I agree that the use of my electronic signature constitutes the legal equivalent of my manual signature for purposes of authenticating the signature to any filing for which it is provided.

[Signature]

[Date]

Note to electronic filer: This attestation must be manually signed before the signatory uses an electronic signature to authenticate an SEC filing. Retain this manually signed initial attestation for a minimum period of seven years after the date of the most recent electronic