

November 25, 2020

SEC Permits Use of Electronic Signatures

The SEC Adopts Amendments to Rule 302 of Regulation S-T and the EDGAR Filer Manual to Allow Signatories to Use Electronic Signatures to “Sign” EDGAR Filings

SUMMARY

On November 17, 2020, the Securities and Exchange Commission adopted [amendments](#) to Regulation S-T and the EDGAR system Filer Manual to permit signatories to use electronic signatures to sign documents that are then filed on EDGAR. In adopting the amendments, the SEC recognized the widespread use of electronic signatures and developments in the technology used to authenticate and secure electronic signatures, as well as the substantial increase in remote work due to the COVID-19 pandemic. The amendments will reduce operational burdens related to obtaining, and maintaining records of, manual “wet” signatures in connection with EDGAR filings.

The amendments will be effective immediately upon publication in the Federal Register. On November 20, 2020, the SEC staff issued a [statement](#) indicating that, prior to effectiveness of the amendments, it will not recommend enforcement action with respect to the requirements of Rule 302(b) so long as a signatory complies with all of the procedural requirements of amended Rule 302(b).

BACKGROUND

Rule 302(b) of Regulation S-T (17 CFR § 232.302) currently requires each signatory to an electronic filing with the SEC through the EDGAR system (“EDGAR filing”) to manually sign a signature page or other document (referred to as an “authentication document”) authenticating, acknowledging or otherwise adopting their typed signature appearing within the EDGAR filing. The document must be executed before or at the time of the EDGAR filing. Rule 302(b) requires a filer to retain the authentication document for five years after the date of the EDGAR filing and to furnish a copy to the SEC upon request.

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In March 2020, the SEC staff issued a statement that, in light of the public health and safety concerns raised by the COVID-19 pandemic, it would not recommend enforcement action under Rule 302(b) if electronic signatures were used and the signatory and filer met certain procedural requirements.¹ This, however, still required the signatory to manually sign a document authenticating any electronic signature and provide such document to the filer for retention as promptly as practical. In April 2020, the SEC received a rulemaking petition requesting that it amend Regulation S-T to permit electronic signatures, in addition to manual signatures, when executing authentication documents in connection with EDGAR filings.² On June 4, 2020, nearly 100 public companies submitted a joint letter to the SEC in support of the rulemaking petition.³ The joint letter notes that “obtaining and retaining manual signatures [...] remains at times a significant logistical challenge,” particularly in situations where signatories do not readily have access to a printer or scanner, such as during business or vacation travel. The joint letter also notes that many companies already routinely obtain electronic signatures from executive officers and board members in many other important contexts.

After considering the widespread use of electronic signatures and technological developments in the authentication and security of electronic signatures, and the issues raised in the rulemaking petition, the SEC reevaluated the requirement that signatories may only manually sign authentication documents and adopted the amendments to Rule 302(b) described below.

AMENDMENTS

Under the amendments, new Rule 302(b)(1) will permit a signatory to electronically execute, as an alternative to manually signing, an authentication document in connection with an EDGAR filing so long as the procedural requirements set forth in the EDGAR Filer Manual (the “Manual”) are met. In order for a signatory to use an electronic signature in an authentication document, the Manual⁴ will require that the electronic signing process must, at a minimum:

- Require the signatory to present a physical, logical or digital credential⁵ that authenticates the signatory’s individual identity;
- Reasonably provide for non-repudiation⁶ 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.

In addition, pursuant to new Rule 302(b)(2), in order to use electronic signatures in authentication documents, a signatory will be required to manually sign an “initial electronic signature authentication document” acknowledging that their electronic signature in any future authentication document constitutes the legal equivalent of their manual signature. The filer will be required to retain the initial electronic signature authentication document in its records for as long as the signatory uses an electronic signature

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on authentication documents and for at least seven years after the date of that signatory's final electronically signed authentication document.

Other requirements relating to EDGAR filings remain unchanged: a filer will continue to be required to retain an authentication document, including any electronically signed authentication document, for five years and to furnish a copy of the authentication document to the SEC upon request, and the signatory must still execute the authentication document before or at the time of the EDGAR filing. However, new Rule 302(b)(3) will provide that any manually signed document, including any initial electronic signature authentication document, may be stored via electronic means.

The SEC also adopted similar amendments to certain rules and forms under the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Company Act of 1940 in order to permit the use of electronic signatures in authentication documents in connection with certain filings.

In the adopting release, the SEC notes that filers that choose to take advantage of these amendments may need to update their compliance systems to ensure compliance with all of the new requirements, including the requirement to obtain a manually signed initial electronic signature authentication document, and to acquire or obtain access to software that meets the electronic signing process requirements in the EDGAR Filer Manual. We expect that many companies will seek to satisfy these new requirements by using third party software, such as DocuSign, Adobe Sign or other similar products, that has been widely used by companies in other contexts.

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ENDNOTES

- ¹ The staff statement was originally issued in March and re-issued with certain modifications in June 2020. See “Staff Statement Regarding Rule 302(b) of Regulation S-T in Light of COVID-19 Concerns,” *available at* <https://www.sec.gov/corpfin/announcement/rule-302b-regulation-s-t-covid-19-update> for the version of the statement issued in June. The statement suggests that SEC staff will not recommend enforcement action if (1) a signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting their typed signature and provides such document, as promptly as reasonably practicable, to the filer for retention; (2) the authentication document indicates the date and time when the signature was executed; and (3) the filer establishes and maintains policies and procedures governing this process. The signatory may also provide an electronic record, such as a photograph or pdf, of the authentication document to the filer.
- ² *Available at* <https://www.sec.gov/rules/petitions/2020/petn4-760.pdf>.
- ³ *Available at* <https://www.sec.gov/comments/4-760/4760-7278993-217809.pdf>.
- ⁴ EDGAR Filer Manual, Volume II: “EDGAR Filing,” Version 55 (November 2020), *available at* <https://www.sec.gov/edgar/filer-information/current-edgar-filer-manual>. Updates to the Manual will be incorporated by reference into the Code of Federal Regulations through amendments to Rule 301 of Regulation S-T.
- ⁵ The term “credential” will be defined in the Manual as “an object or data structure exclusively possessed and controlled by an individual to assert identity and provide for authentication.”
- ⁶ The term “non-repudiation” will be defined in the Manual as “assurance that an individual cannot falsely deny having performed a particular action.”

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