



SEC Votes to Adopt Rule Amendments in Order to Facilitate Electronic Submission of Documents

Dec 2, 2020

Reading Time : **6 min**

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In addition to Rule 302(b), the following rules and forms were also amended by the SEC in order to permit the use of electronic signatures in signature authentication documents in connection with certain specified filings: Securities Act Rule 402, Securities Act Rule 471, Regulation S-T Rule 301, Regulation S-T Rule 302, Exchange Act Rule 12b-11, Exchange Act Rule 14d-1, Exchange Act Rule 15Fb1-1, Exchange Act Rule 16a-3, Form CB and Investment Company Act Rule 8b-11.

Background

Rule 302(b) requires that each signatory to documents electronically filed with the SEC under the federal securities laws manually sign a signature page or other document for the purposes of authenticating and acknowledging his or her signature that appears in typed form on the electronic filing. Such documents must be executed before or at the time the electronic filing is made with the SEC. In addition, filers must retain such documents for a period of five years and must furnish copies to the SEC upon request.

Earlier this year, the SEC released a [statement](#) regarding compliance with Rule 302(b) given the difficulties filers and signatories were facing in light of COVID-19. Due to these difficulties, the staff of the Division of Corporation Finance stated that they would recommend the SEC not take enforcement action with respect to Rule 302(b) if a signatory retains a manually signed signature page or other document authenticating his or her signature that appears in typed form within the electronic filing and provides such document to the filer for retention in the ordinary course, and certain other conditions are met.

In April 2020, the SEC received a rulemaking petition requesting that the SEC permit the use of electronic signatures when executing authentication documents under Rule 302(b). In June 2020, nearly 100 public companies had jointly submitted a letter in support of the rulemaking petition.

The amendments to Rule 302(b) adopted on November 17, 2020, permit a signatory to an electronic filing to sign an authentication document through an electronic signature if certain requirements specified in the EDGAR Filer Manual are met. The SEC noted that these amendments are, in part, to recognize the extensive use of electronic signatures and advancements in the authentication and security of electronic signatures, as well as the ongoing need to support the increasing remote workforces.

Amendments to Regulation S-T and the EDGAR Filer Manual

The amendment to Rule 302(b) does not completely remove the need for a manual signature. Under Rule 302(b)(2), a signatory may use an electronic signature to sign an authentication document if such signatory first manually signs a document attesting that the signatory agrees that the use of such electronic signature constitutes the legal equivalent of such individual's manual signature for purposes of authenticating the signature to any filing. An electronic filer must retain this document for a minimum period of seven years after the date of the most recent electronically signed authentication document by such signatory. The addition to Rule 302(b)(3) further allows for both a manually signed authentication document and the initial electronic signature authentication document to be retained and stored electronically by the filer.

Rule 302(b) also requires that an electronically signed authentication document meet the requirements described in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing" (Version 55) (November 2020), which sets forth certain requirements that the electronic signing process must meet when electronic signatures are used. The EDGAR Filer Manual specifies that if a signatory signs an authentication document using an electronic signature, the signing process must, at a minimum:

1. require the signatory to present a physical, logical or digital credential that authenticates the signatory's individual identity;
2. reasonably provide for nonrepudiation of the signature;

3. provide that the signature be attached, affixed or otherwise logically associated with the signature page or document being signed; and
4. include a timestamp to record the date and time of the signature.

The amendments will not be effective until publication of the adopting release in the Federal Register; however, the staff has stated that they will not recommend the SEC take enforcement action with respect to the requirements of Rule 302(b) in advance of the amendments going effective, provided that a signatory complies with all of the requirements of the amended Rule 302(b).

Analysis

Filers should confirm that their electronic signing process conforms to the updated EDGAR Filer Manual requirements. The EDGAR Filer Manual defines an **electronic signature** or “**e-signature**” 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. Most electronic signature software produce a computer generated image based on the signatory’s name that is used to initial in places where necessary and sign the signature blocks on transactional documents. Such image likely satisfies this requirement under the third EDGAR Filer Manual. Additionally, certain popular e-signature software allows users to upload any document that requires signatures and for users to indicate where in the document the signatory needs to sign, which satisfies the EDGAR Filer Manual requirement to affix the signature in a place logically associated with the signature page or document being signed.

The EDGAR Filer Manual also states that the term **credential** connotes an object or data structure exclusively possessed and controlled by an individual signatory to assert identity and provide for authentication. E-signature software typically provides a multitude of methods to verify a user’s or signatory’s identity. Verification methods such as email address, access code, phone call, SMS text message, verification based on personal knowledge-based verification and ID verification are utilized by popular e-signature software, one or more of which could be utilized by filers to satisfy the EDGAR Filer Manual’s first requirement to supply credentials that authenticate the signatory’s individual identity.

In addition to the necessary credentials, the second requirement provides that the signing process must prevent repudiation by the signatory. The EDGAR Filer Manual defines **nonrepudiation** to mean that the filer and the signatory provide assurance that an individual

cannot falsely deny having performed a particular action. Again, the e-signature industry has addressed this requirement in various ways. Most e-signature companies require that the signatory sign disclosure documents and agree to use the electronic process before proceeding to review the document for signature and execution. Further, once the signing process is complete, all documents are digitally sealed using industry-standard Public Key Infrastructure technology. This seal indicates that the e-signature is valid, and that the document hasn't been altered since the date of signing.

Unlike wet manual signatures, e-signatures provide an electronic record that serves as an audit trail and proof of the transaction. Such audit trail provides the history of actions taken in connection with the document, including the details of when the document was opened, viewed and signed. Depending on the e-signature software provider, and if the signatory agrees to allow access to the software to pinpoint their location, the record will also show the geolocation where the document was executed. These measures can assist with preventing repudiation if one of the signatories disputes their signature. Lastly, several e-signature software providers issue certificates of completion that provide specific details about each signatory on the document, including (i) the consumer disclosure indicating the signatory agreed to utilize e-signature for the execution of the document, (ii) the signature image, (iii) the signatory's IP address and (iv) key event timestamps, which would provide for the last requirement under the EDGAR Filer Manual to provide a timestamp record with the date and time of the signature.

Conclusion

These amendments are welcomed relief intended to ease the burden of remote working arrangements caused by both the COVID-19 pandemic and companies' shift towards remote workforces over the past several years. In addition, the amendments modernize the SEC electronic filing process by utilizing technology that filers may already be familiar with, either individually in their personal lives or in connection with business transactions outside of the SEC's confines. While e-signature technology may be new to filings on the EDGAR system, some filers may already utilize e-signature software as a way of executing documents both externally and internally. This may help facilitate the transition when adding Rule 302(b) electronic filings on EDGAR to their internal processes.

Nonetheless, filers, more specifically corporate compliance departments, will either need to review existing processes and procedures or put in place updated or new process and procedures to ensure filers meet the requirements of Rule 302(b). For example, a filer will

need to decide which forms of credentials it desires to use for authentication purposes or if there exist an e-signature audit trail within the filer's existing internal compliance processes that suffice for nonrepudiation under the EDGAR Filer Manual. Even with the internal review filers must conduct, the amendments to Rule 302(b) will hopefully alleviate some of the previous burdens of the manual signature requirements and create more flexibility for filers and signatories.

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