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## SEC Finally Permits Electronic Signatures in SEC Filings

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On November 17, 2020, the SEC adopted final rules allowing for the use of electronic signatures in SEC filings in a release titled *Electronic Signatures in Regulation S-T Rule 302*,<sup>1</sup> (the “E-Signature Release”). This action followed the submission of a petition for rulemaking by a group of law firms at the height of the COVID-19 pandemic this past spring. The petition, which itself was signed utilizing DocuSign, a leading e-signature transaction management program, underscored how e-signatures are routinely used in connection with board of directors’ authorizations and important corporate transactions.<sup>2</sup>

The new electronic signature rules will not be effective until the E-Signature Release is published in the Federal Register. However, on November 20, 2020, the SEC staff provided guidance permitting early compliance with the new rules.<sup>3</sup> Accordingly, registrants and other filers may start using electronic signatures immediately, subject to compliance with the amended rules. As discussed further below, the use of electronic signatures is conditioned only upon the requirement that the person using an electronic signature has previously *manually* signed an attestation regarding the legal equivalency of the electronic signature with such person’s manual signature.

### Amendments to Rule 302 of Regulation S-T to Allow Electronic Signatures

Rule 302 of Regulation S-T (“**Rule 302**”) provides that required signatures to, or within, all electronic submissions on the SEC’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”) must be in typed form rather than manual format. Prior to adoption of amendments to Rule 302 in the E-Signature Release, each signatory to an electronic filing was required to *manually* sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing (the “authentication document”). Thus, wet ink signatures were necessary for the filing of all electronic submissions with the SEC that required signatures. The E-Signature Release amends Rule 302 to allow a signatory to *electronically* or manually sign an authentication document. Regardless of whether an authentication document is manually signed or signed electronically, Rule 302 requires that the authentication document be signed before or at the time the electronic filing is made and must be retained by the filer for five years. Leading e-signature transaction management programs, such as DocuSign and Adobe Sign, generate a time-stamp when the document is electronically signed and the resulting signature can be permanently stored in a cloud-based system.

### Process for Electronic Signatures; Definition of Electronic Signature

The signing process for an electronic signature is set forth in the EDGAR Filer Manual (the "Filer Manual") and must, at a minimum:

- require the signatory to present a physical, logical, or digital credential<sup>4</sup> that authenticates the signatory's individual identity;
- reasonably provide for non-repudiation<sup>5</sup> 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.<sup>6</sup>

The Filer Manual defines the term "electronic 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." It is interesting that the SEC has chosen to include, among other things, "an electronic sound" as an electronic signature. This would seem to contemplate that a voicemail could serve as an electronic signature if it contained the proper information and were logically associated with the document requiring signature. Likewise, an email could serve as an electronic signature based on the definition of electronic signature. Clearly, the leading electronic signature programs would qualify as electronic signatures under the amended rules.

### An Attestation Must be Manually Signed Before an Electronic Signature May be Used

As noted above, before a person may use an electronic signature on an authentication document, such person must *manually* sign a document attesting that, when using an electronic signature to sign an authentication document, 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 for which the electronic signature is provided (an "Attestation"). A manually executed Attestation must be retained by the signatory for as long as the signatory may use an electronic signature to sign an authentication document pursuant to Rule 302 and for a period of seven years after the date of the most recent electronically signed authentication document. We have attached as Exhibit A hereto a form of Attestation that is intended to satisfy the requirement.

### Requirement to Furnish Authentication Documents and Attestations upon Request; Electronic Storage

Upon request, an electronic filer is required to furnish the SEC or its staff with a copy of any and all authentication documents or Attestations retained pursuant to Rule 302. In addition, paragraph (b)(3) of Rule 302 specifically provides that authentication documents and Attestations may be retained and stored electronically.

### Filings for Which Electronic Signatures are Permitted

Electronic signatures are now permitted to be used for registration statements under the Securities Act of 1933, as amended (e.g., Forms S-1, S-3, S-4, F-1, F-3, and F-4), as well as reports and other documents filed pursuant to the Securities Exchange Act of 1934, as amended (e.g., Forms 8-A, 8-K, 10, 10-K, and 10-Q, as well as beneficial ownership reports filed pursuant to Section 16 and Sections 13(d) and 13(g) and Schedule TO).

**Exhibit A****SEC FILING ELECTRONIC SIGNATURE ATTESTATION**

**WHEREAS**, The undersigned is or may become a signatory to certain documents (“SEC Filings”) that are filed electronically with the U.S. Securities and Exchange Commission (the “SEC”);

**WHEREAS**, in accordance with Rule 302(a) of Regulation S-T, required signatures to electronic submissions made to the SEC must be typed;

**WHEREAS**, pursuant to Rule 302(b)(1) of Regulation S-T, each signatory to an electronic filing must manually or electronically sign a signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing (“authentication document”);

**WHEREAS**, pursuant to Rule 302(b)(2) of Regulation S-T, before a signatory may electronically sign an authentication document, such signatory must *manually* sign a document making the attestation set forth below; and

**WHEREAS**, the undersigned desires to sign authentication documents electronically;

**NOW, THEREFORE, THE UNDERSIGNED HEREBY ATTESTS THAT:**

1. When using electronic signatures for purposes of signing authentication documents, the undersigned agrees that the use of such electronic signature constitutes the legal equivalent of the undersigned’s manual signature for purposes of authenticating the signature to any SEC Filing for which it is provided.
2. The undersigned will retain this attestation for as long as the undersigned may use an electronic signature to sign an authentication document pursuant to Rule 302 of Regulation S-T and for a period of seven years after the date of the most recent electronically signed authentication document.

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[TYPE NAME]

Date: \_\_\_\_\_

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<sup>1</sup> Release Nos. 33-10889; 34-90441; 39-2534; IC-34096(November 17, 2020). The E-Signature Release is available at <https://www.sec.gov/rules/final/2020/33-10889.pdf>. The SEC press release relating to the E-Signature Release is available at <https://www.sec.gov/news/press-release/2020-286>.

<sup>2</sup> Petition for Rulemaking re: Use of Electronic Signatures under Regulation S-T (April 16, 2020), available at <https://www.sec.gov/rules/petitions/2020/petn4-760.pdf>.

<sup>3</sup> The SEC staff's guidance allowing immediate use of the electronic signature rules is available at <https://www.sec.gov/corpfin/announcement/staff-statement-rule-302b-regulation-st-covid-19>.

<sup>4</sup> The Filer Manual defines the term "credential" as "an object or data structure exclusively possessed and controlled by an individual to assert identity and provide for authentication." The email address and identity verification protocols employed by the leading e-signature transaction management programs would qualify as a "credential" for purposes of the new rules.

<sup>5</sup> The Filer Manual defines the term "non-repudiation" as "assurance that an individual cannot falsely deny having performed a particular action."

<sup>6</sup> Filer Manual – Volume II, Section 5.1.2

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