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Should Our Directors Follow a Different E-Signature Process Than Our Executives?

Following up on [my series of e-signature blogs](#), one of the in-house lawyer's little secrets is that not all directors sign the signature page for the Form 10-K on the date the 10-K is filed. Even though the signature page typically reflects that's the case. It would be nearly impossible to collect a signature from each director on any given day, even with the relative ease of collecting them electronically. Directors tend to be busy people, sometimes spread over a dozen or more time zones. There's no harm in this widespread practice. There's no problem with collecting manual signatures in advance. Getting them *after* a filing is made with the SEC clearly is much more of a problem. [Reasons Why You May Still Be Collecting Manual Signatures](#) This is one reason why outside directors might still be signing manually. With an electronic signature process, the signatures are time-stamped and the date is fixed in stone. With a manual signature, there is room for more fluidity. Luckily, there is a recommended workaround for this issue, identified in the [excellent client memo](#) that our firm put out way back when the SEC amended its e-signature rules in 2020. A bigger reason why you may ask outside directors to continue to sign manually is a concern over security. If you're not using a professional electronic agreement service like DocuSign, Adobe Sign or a board portal with a signature feature (or the dozen other providers out there - you'll want to ensure that the provider you choose meets the SEC's standards), personal email addresses alone likely don't fit the bill. They probably don't meet the SEC's standards. You may well need directors to jump through extra hoops, ones that can be confusing and annoying for them. The final analysis for some companies may reveal that continued collection of manual signatures for directors is a simpler and more uniform process, particularly if you can accomplish that at an in-person board meeting. [The Debate Over "Affirmative Reply" Emails](#) Let me segue into the debate over "affirmative reply" emails. Some practitioners are taking the view they alone aren't enough to meet the SEC's standards without something more. They alone aren't sufficiently secure to authenticate the signer's individual identity. Emailing back a PDF of a manually signed page probably gets you closer to the mark, but still not all the way there for some. I'm in that camp that these actions alone aren't enough to meet the SEC's standards without more guidance from the Staff. You need to build a "trust circle" process. Starting with answering the question of "how can we confirm *individual* identity as part of our authentication process?" You may find yourself concluding that you should link your I-9 process (*e.g.*, an HR record where you match a passport or driver's license to the individual) logically and systematically to a unique employee identifier, then logically and systematically connecting that to a unique email account used to create a professional electronic agreement account (which is supported by multi-factor authentication). Then consider the question of "how do we verify a credential?" You may find that you create "alias" email addresses that are used to access the professional electronic agreement account, with a different password and MFA (multi-factor authentication). You see. This isn't easy stuff. You may need to go through this kind of rigmarole because some administrative assistants have access to their insider's primary email account credentials. That's what a plaintiff's lawyer might argue. As a result, the SEC's "exclusively possessed and controlled" requirement might require an approach that seems like overkill. A few last points about directors. Many of the board portals have signature platforms. In most cases, you can use their services to enable SEC compliant signatures, but you might have to purchase an extra feature to ensure that your portal complies with the SEC's requirements. So you'll want to kick that tire. The SEC's Edgar Filer Manual requires that signatures be associated with the particular filing to which they relate. For directors, you're probably going to be routing SEC filings for review through a board portal. Just ensure you keep evidence that a particular filing is associated with a particular e-signature as you normally would.

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