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## Requirements Pertaining to the Electronic Delivery of Required Documents

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**R**ecent research indicates that approximately 80 percent of investors in the United States have access to the Internet in their homes.<sup>1</sup> For a growing number of people, the Internet is the preferred way to communicate and do business.<sup>2</sup> Given the widespread use of the Internet, increasing consumer preference to communicate electronically and the cost savings associated with providing electronic documents instead of paper, investment advisers, broker-dealers and other market participants are seeking to do more of their business electronically. As part of this process, questions arise regarding what is required for firms to deliver information to their customers electronically.

The Securities and Exchange Commission (SEC) was among the first federal agencies to authorize the use of electronic media to deliver required information to consumers. As a result, the securities industry has been at the forefront of adopting and using electronic technology to comply with its regulatory obligations. Most recently, the SEC amended the

proxy rules under the Securities Exchange Act of 1934 (Exchange Act) to permit issuers and other persons required to furnish proxy materials to make such materials available to shareholders by posting them on an Internet Web site and providing shareholders with notice of the availability of the proxy materials.<sup>3</sup>

With respect to the use of electronic media to fulfill other obligations under the federal securities laws to deliver required information to investors, the SEC issued guidance in 1995, 1996, and 2000 (Electronic Delivery

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Releases).<sup>4</sup> In these releases the SEC stated that information distributed through electronic means will satisfy the delivery requirements laws if the intended recipients receive “substantially equivalent information” as they would have received in paper form.<sup>5</sup> In addition, the SEC discussed issues of notice and access that should be considered in determining whether the delivery requirements have been satisfied, and stated that there must be a reason to believe that the information has been delivered.<sup>6</sup>

Subsequent to the SEC’s issuance of these releases, Congress enacted the Electronic Signatures in Global and National Commerce Act of 2000 (ESIGN).<sup>7</sup> ESIGN is designed to promote the use of electronic commerce by permitting the use of electronic signatures, contracts and other records in transactions in interstate and foreign commerce. Among other things, ESIGN includes specific consumer consent requirements that apply to the use of an electronic record to satisfy a statute or regulation requiring that information be provided to a consumer in writing.

Although the Electronic Delivery Releases and ESIGN are generally compatible, the consumer consent requirements in ESIGN impose specific requirements that providers must meet that go beyond what the SEC set forth in the Electronic Delivery Releases. Although the SEC adopted a rule that exempts from the ESIGN consumer consent requirements the delivery of investment company prospectuses for the sole purpose of permitting supplemental sales literature to be provided to prospective investors,<sup>8</sup> it has not otherwise directly addressed the applicability of the ESIGN consumer consent requirements to other delivery requirements under the federal securities laws. Thus, as the seven-year anniversary of the passage of ESIGN approaches, there continues to be uncertainty about whether SEC-regulated entities can rely solely on the Electronic Delivery Releases or whether they must also comply with ESIGN’s consumer consent requirements.

This article outlines the consumer consent requirements under both the Electronic Delivery Releases and ESIGN and describes the major differences between the two. It then analyzes the SEC’s response to ESIGN and its subsequent

statements regarding electronic delivery. It concludes that, although it appears that the SEC has informally taken the position that following the electronic delivery requirements set forth in its Electronic Delivery Releases is sufficient, it would be helpful for the SEC to issue updated guidance and further exemptions to clarify the issue. In addition, even if not required, advisers, broker-dealers and other SEC-regulated entities may want to incorporate at least some of the elements of the ESIGN consumer consent requirements into their policies and procedures to assist them in achieving effective informed consent to electronic delivery.

### **SEC Interpretive Releases**

The SEC first published its views on the use of electronic media to deliver information to investors in 1995. The interpretive guidance in the 1995 Release addressed the electronic delivery of prospectuses, annual reports to securities holders and proxy solicitation materials.<sup>9</sup> In 1996, the SEC published another release that provided guidance on electronic delivery of information required to be delivered to customers and prospective customers by broker-dealers and transfer agents under the Exchange Act and by Investment Advisers under the Investment Advisers Act of 1940 (Advisers Act).<sup>10</sup> Finally in 2000, the SEC issued a third release that provided guidance clarifying some of the regulatory issues relating to electronic delivery that arose after the issuance of the first two releases.<sup>11</sup> Together, the releases establish a broad framework for using electronic media (including the Internet, electronic mail, proprietary computer networks, CD-ROMs, audiotapes, and videotapes) to satisfy a party’s delivery obligations.

In the first two Electronic Delivery Releases the SEC stated that information distributed through electronic means will satisfy the delivery requirements under the federal securities laws if the process results in recipients receiving “substantially equivalent information” as they would have received if the information had been delivered in paper form.<sup>12</sup> The SEC established three basic principles in the use of electronic delivery: notice, access and evidence of delivery.<sup>13</sup> The SEC made it clear that a party can rely on the principles and examples

set forth in the Electronic Delivery Releases to satisfy its delivery obligations under the federal securities laws; however, parties are free to develop alternative methods of electronic delivery that provide assurance comparable to paper delivery that the required information will be delivered.<sup>14</sup> Investors also must be provided with paper upon request or if they revoke their consent to receive documents electronically.<sup>15</sup>

The SEC gave the following guidance on the three basic principles that it established in the releases:

*Notice.* The SEC stated that those providing electronic delivery should consider the extent to which such delivery provides timely and adequate notice that information is available. Providing an electronic document itself would generally be sufficient notice. However, if a document is posted on a web site, separate notice would be necessary to satisfy the delivery requirements unless the provider can otherwise show evidence that delivery was made.

*Access.* The SEC stated that access to electronic documents should be comparable to that provided by postal mail. The use of a particular medium should not be so burdensome that the intended recipients cannot effectively access the information provided. In addition, persons who receive information electronically should be able to retain the information through the selected medium or have ongoing access equivalent to personal retention.

*Evidence of Delivery.* Finally, providers should have reason to believe that an investor has actually received the information. The SEC listed five non-exclusive types of electronic delivery evidence:

- Obtaining an informed consent from an investor to receive the information through a particular electronic medium coupled with assuring appropriate notice and access;
- Obtaining evidence that an investor actually received the information, for example, by electronic mail return-receipt or confirmation of accessing, downloading, or printing;
- Disseminating information through certain facsimile methods;

- An investor's accessing a document with hyperlinking to a required document; and
- Using forms or other material available only by accessing the information.

In its 2000 Release, the SEC reaffirmed the above framework for electronic delivery and provided further guidance in several areas, including global consent and use of Adobe Acrobat PDF. The SEC clarified that an investor may give a global consent to electronic delivery relating to all documents so long as the consent is informed.<sup>16</sup> The SEC went on to explain that a global consent that is merely of a provision of an agreement that an investor is required to execute to receive other services would probably not be adequate for informed consent; instead the electronic delivery authorization should be in a separate section of the agreement or in a separate document altogether.<sup>17</sup> To be informed, the consent must also specify the various types of electronic media that may be used.

Regarding access, the SEC clarified that issuers and market intermediaries delivering documents electronically may use PDF if they inform investors of the requirements necessary to download a PDF when obtaining consent and provide investors with any necessary software and technical assistance at no cost.<sup>18</sup>

## **ESIGN**

Congress enacted the ESIGN to promote the use of electronic commerce by permitting the use of electronic signatures, contracts and other records in transactions in interstate and foreign commerce. This legislation generally provides that a signature, contract or other record relating to a transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form.<sup>19</sup> In addition, a contract relating to such transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or record was used in its formation.<sup>20</sup> ESIGN also specifically permits persons legally required to retain records relating to transactions in or affecting interstate or foreign commerce to do so in electronic form, provided that those records are stored in a manner that meets certain criteria.<sup>21</sup>

With respect to electronic delivery of required information, ESIGN states that if a “state, regulation, or other rule of law” requires records to be provided or made available to consumers “in writing,” an electronic record may be used only if the consent procedures in the statute are followed.<sup>22</sup> These procedures require that: (1) the consumer has affirmatively consented to the use of the electronic records and has not withdrawn such consent; and (2) the consumer has consented electronically, or confirmed his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.<sup>23</sup>

In addition, prior to obtaining the consumer’s consent to use or receive electronic records, ESIGN requires the record provider to deliver a “clear and conspicuous” statement informing the consumer of:

- Any right or option of the consumer to have the record provided or made available in paper form;
- Any right or option of the consumer to withdraw consent and any conditions, consequences (which may include termination of the parties’ relationship) or fees in the case of such a withdrawal;
- Whether the consent applies (i) only to the particular transactions that gave rise to the obligation to provide the record, or (ii) to all identified categories of records that may be provided during the course of the parties’ relationship;
- Procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically; and
- How, following consent, the consumer may, upon request, obtain a paper copy of the electronic record and whether any fee will be charged for such a copy.<sup>24</sup>

Prior to obtaining consent, the consumer must be provided with a statement of hardware

and software requirements for access to any retention of the electronic records.<sup>25</sup>

These consumer consent procedures are not required in all circumstances. In general, determining whether the ESIGN consumer consent process is applicable is a three part test. Absent an exemption, it is generally necessary to use the ESIGN consumer consent process only when: (1) there is a consumer involved; (2) there is a statute, regulation, or rule of law requiring that information be “provided” or “made available” to the consumer; and (3) there is a statute, regulation or rule of law requiring that the information be in “writing.”<sup>26</sup>

A technical failure to comply with ESIGN’s consumer consent and disclosure requirements might result in ineffective delivery of the required information, even if the violation was not intentional and did not prevent receipt and review of the required information. However, the legal effectiveness of a contract may not be denied solely because of the failure of the provider to obtain the consumer’s electronic consent or confirmation of the consent by that consumer.<sup>27</sup>

ESIGN states that federal agencies may interpret ESIGN Section 101, which includes the consumer consent requirements, by issuing rules and interpretive guidance under the statutes that they administer.<sup>28</sup> However, their rules, orders or guidance cannot be inconsistent with or “add to the requirements of” Section 101.<sup>29</sup> In addition, the agency must also make findings that its rule or guidance is substantially justified, and that the methods chosen to carry out its purpose (1) are substantially the equivalent to the requirements for non-electronic records; (2) will not impose unreasonable costs on the acceptance and use of electronic records; and (3) do not require, or accord greater legal status or effect to a specific technology for creating, sending or maintaining records or signatures.

A federal agency may also issue an order or adopt a rule that exempts certain categories or types of records from ESIGN’s consumer consent requirements after notice and an opportunity for public comment if the exemption is “necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.”<sup>30</sup> The statute specifically directed the SEC to issue a regulation or order exempting from

the ESIGN consumer consent requirements records that are required to be provided *solely* to permit advertising, sales literature or other information concerning investment company securities to be excluded from the definition of a prospectus under the Securities Act.<sup>31</sup>

## Differences between SEC Guidance and ESIGN

While both the Electronic Delivery Releases and ESIGN permit the electronic delivery of required documents, the SEC generally leaves the details, such as the format of the consumer consent and disclosure, up to the industry and the market. ESIGN on the other hand, imposes affirmative consent and demonstration requirements, and sets forth specific items that must be disclosed to investors prior to delivery. Thus, compliance with the ESIGN consumer consent procedures would fulfill the access, notice and evidence of delivery principles of the Electronic Delivery Releases. However, an electronic delivery process that would be acceptable under the Releases would not necessarily comply with the ESIGN requirements.

The major differences between the SEC guidance and the ESIGN consumer consent process are that ESIGN requires: (1) a consumer to affirmatively consent to electronic delivery in all cases; (2) consent given to be electronic or confirmed electronically; and (3) a reasonable demonstration that the consumer can access the information in the electronic form that will be used to provide the information.<sup>32</sup> The Electronic Delivery Releases do not specifically require these elements.

Unlike ESIGN, under the Electronic Delivery Releases, clients do not need to provide affirmative consent if there is other evidence to show delivery. In addition, the SEC permits clients to give consent to electronic delivery in a separate section of or in a separate paper agreement.<sup>33</sup> Under ESIGN, however, if the client signs a paper agreement containing a consent to conduct business electronically, the language of ESIGN appears to require that this consent be followed up by an electronic confirmation of consent.<sup>34</sup> In addition, the SEC has stated that PDF is an acceptable form of delivery if firms or issuers inform investors of the requirement necessary to download

PDF when obtaining consent to electronic delivery.<sup>35</sup> By contrast, under ESIGN, if a firm intends to send required disclosures to a consumer in PDF format, the firm should also send the consumer consent disclosure and request for consent or confirmation of consent in PDF format or at least demonstrate in some manner that the consumer can access the information in PDF format.<sup>36</sup>

## The SEC's Response to ESIGN

As directed by ESIGN, shortly after its passage, the SEC adopted Rule 160 under the Securities Act, which permits a fund to provide supplemental sales literature on its website or by other electronic means without first obtaining an investor's consent to receive in electronic form the statutory prospectus that is required to precede or accompany the supplemental sales literature, provided the investor has reasonably comparable access to both the prospectus and the sales literature. The SEC stated that the rule clarifies that funds may continue this practice, which was permitted under its Electronic Delivery Releases.<sup>37</sup> In the Rule 160 Release, the SEC stated that the Rule 160 exemption is not available when a fund prospectus is provided to an investor for other purposes.<sup>38</sup> It went on to say that it was expressing no view regarding how ESIGN affects the securities laws and that it was continuing to consider the implications of ESIGN on securities transactions. Based on these statements, many people expected the SEC to use its interpretive authority to clarify the relationship between ESIGN's consumer consent provisions and the Electronic Delivery Releases with respect to other delivery requirements under the federal securities laws.

Although the SEC later issued interpretations regarding the relationship between its recordkeeping requirements and ESIGN,<sup>39</sup> it has not issued further guidance with respect to electronic delivery. Recent statements by the SEC and its Staff indicate, however, that it does not believe that ESIGN impacted its guidance regarding consumer consent in the Electronic Delivery Releases. For example, in a Q&A that the Staff of the Division of Investment Management issued regarding the amended custody rule under the Advisers Act,<sup>40</sup> the

question was posed whether account statements required to be delivered under the amended rule could be delivered electronically. The Staff responded “yes” and cited the 1996 Release.<sup>41</sup>

More recently, as noted, the SEC adopted amendments to the proxy rules under the Exchange Act to provide an alternative method for issuers and others to furnish proxy materials to shareholders.<sup>42</sup> Under the amendments, delivery obligations are satisfied by merely posting the materials on a Web site and providing shareholders with notice of the availability of the proxy materials (the “notice and access” model without any evidence of delivery). In the adopting release the SEC stated that:

The new rules do not affect the availability of other means of providing proxy materials to shareholders, such as obtaining affirmative consents for electronic delivery pursuant to existing [SEC] guidance [citing the 1995, 1996 and 2000 Releases].

No mention was made of ESIGN in the release.

### **What Do Firms Need to Do?**

Because the SEC has not issued any interpretative guidance or exemptions pursuant to ESIGN regarding electronic delivery requirements beyond what the statute expressly required, it has not provided a definitive answer to the question whether investment advisers, funds, broker-dealers and other market participants can rely on the SEC’s guidance in the Electronic Delivery Releases when obtaining consumer consent to electronic delivery or whether they must also or instead follow the consumer consent procedures in ESIGN.

Even without specific SEC guidance, there are good arguments that the ESIGN consumer consent requirements are not applicable to the delivery of documents under the federal securities laws. First, the Electronic Delivery Releases interpreted the writing requirements in the securities laws’ delivery requirements to be satisfied by electronic delivery. Therefore, an argument can be made that the documents are no longer required to be delivered “in writing,” and thus Section 101(c) does not apply.

As explained above, the ESIGN consumer consent process is only applicable if the information is required by statute, regulation or other rule of law to be provided “in writing.” If there is an express statutory or regulatory authorization to provide information electronically, the information is not required to be provided “in writing” as contemplated by ESIGN. For example, Regulation S-P provides that broker-dealers, advisers and funds may deliver privacy and opt out notices “so that each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically.”<sup>43</sup> Thus, privacy notices can be delivered electronically without compliance with ESIGN’s customer consent requirements.

Similarly, for the purposes of interpreting ESIGN, it can be argued that the SEC’s interpretive guidance enabling electronic delivery has the same effect as an amendment to each requirement under the securities laws to add “or electronically.” Thus, as with the delivery of privacy notices, the ESIGN consumer consent process would be inapplicable because the SEC does not require these documents to be delivered exclusively “in writing.”

Another theory is that ESIGN is a “safe harbor.” Under this theory if the agency has independent general rulemaking authority to allow the agency to make rules for electronic records outside of ESIGN, ESIGN did not affect that authority.<sup>44</sup> However, the SEC seemed to reject this argument when it addressed the electronic record provisions of ESIGN in various releases.<sup>45</sup>

On a practical level, although it has not taken formal action under ESIGN regarding the applicability of its consumer consent requirements, the SEC appears to have taken the position, albeit indirectly, that its previous guidance stands. All indications are that if it were to act, the SEC would issue an interpretation that its guidance is consistent with ESIGN and provide exemptions from 101(c) when it determines it necessary to keep its existing framework in place. Thus, it seems unlikely that the SEC or its Staff would find that an investment adviser, broker-dealer, or other SEC regulated entity had failed to deliver a document if it followed the guidance in the Electronic Delivery Releases.

A consumer could potentially argue in an arbitration proceeding or lawsuit that ESIGN's consumer consent requirements are applicable and were not followed, and thus a document that he or she was entitled to receive was not delivered. However, if a firm can show evidence that a document was effectively delivered this argument would probably have little practical impact. The failure to follow its consumer consent requirements does not affect the validity or enforceability of a contract under ESIGN.<sup>46</sup> However, if a disclosure that was required to be delivered electronically is deemed not to have been delivered to the consumer, then there may be liability on the part of the sender for failure to deliver. If, for instance a Form ADV, Part II (or equivalent brochure) describing conflicts of interest and risks associated with an investment strategy is deemed not to have been delivered to an investor, this may expose the adviser to risk in an arbitration proceeding.

Finally, the SEC's silence on the applicability of the ESIGN consumer consent process and the implication that compliance with the Electronic Delivery Releases is sufficient does not mean that broker dealers, investment advisers and other market participants can necessarily disregard the ESIGN requirements as to certain accounts and/or transactions because they involve laws beyond the jurisdiction of the SEC. For example, variable annuity transactions may be covered by state insurance laws.<sup>47</sup> In addition, certain materials may be required to be delivered to retirement plan participants under state or federal law. These delivery requirements may be subject to ESIGN or to state laws that have parallel requirements pertaining to consumer consent to electronic delivery of required documents. Thus, electronic delivery of certain required documents under these laws may not be effective unless the ESIGN consumer consent is followed.

## Conclusion

As technology changes and electronic delivery becomes more commonplace, the SEC will at some point revisit the guidance set forth in its Electronic Delivery Releases. At that time, hopefully the SEC will include guidance regarding the applicability of the ESIGN

consumer consent process. Preferably, the SEC will use its exemptive authority under ESIGN to state that the ESIGN consumer consent process need not be followed with respect to the delivery requirements under the federal securities laws if firms follow the SEC's published guidance.

Even if not required to comply with ESIGN consumer consent requirements in connection with electronic delivery of information required to be delivered pursuant to the federal securities laws, as firms grapple with how to effectively deliver documents to their clients, the ESIGN requirements provide a good roadmap for obtaining consumer consent and evidence of delivery. If a firm adopts the ESIGN consumer consent process, not only will it satisfy the delivery framework in the Electronic Delivery Releases, but it will have the protection and certainty of the ESIGN safe harbor. Even if firms decide not to adopt all of the ESIGN requirements, incorporating elements of these requirements, when applicable, can provide firms with a level of confidence that they are complying with the Electronic Delivery Releases using methods that have been vetted and incorporated into federal law. Finally, firms with document delivery requirements in addition to those under the federal securities laws may find it simpler to comply with the ESIGN requirements so that they can maintain one consumer consent process for the delivery of all types of required documents.

## NOTES

1. See *Internet Availability of Proxy Materials*, Securities Exchange Act Release No. 55146 and Investment Company Act Release No. 27671 at n.35 (Jan. 22, 2007).
2. For example, approximately 87.8 percent of shares voted during the 2006 proxy season were voted electronically. See *infra* text accompanying note 34.
3. *Id.*
4. *Use of Electronic Media for Delivery Purposes*, Securities Act Release No. 7233 (Oct. 6, 1995) (1995 Release); *Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information*, Securities Act Release No. 7288 (May 9, 1996) (1996 Release); and *Use of Electronic Media*, Securities Act Release No. 7856 (Apr. 28, 2000) (2000 Release).
5. 1996 Release at \*4.

6. *Id.*
7. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000).
8. Securities Act of 1933 (Securities Act) Rule 160.
9. See 1995 Release, *supra* n.4.
10. See 1996 Release, *supra* n.4.
11. See 2000 Release, *supra* n.4.
12. 1995 Release at \*4; 1996 Release at \*3.
13. The 1996 Release also discussed advisers' and broker-dealers' requirements in delivering a client's or customer's personal financial information electronically. In particular, the 1996 Release noted that they should (1) take reasonable precautions to ensure the confidentiality and security of personal financial information; and (2) obtain the intended recipient's informed consent prior to delivering any personal financial information, unless responding to a request for information that is made through electronic media or the person making the request specifies delivery through a particular electronic medium. The Release also set forth a list of provisions under the Advisers Act and Exchange Act to which advisers and broker-dealers may apply the SEC's guidance. For example, Advisers Act Section 206(3) (principal transaction disclosure) and Rules 204-3 (brochure delivery), 206(3)-2 (agency cross transaction disclosure) and 206(4)-3 (disclosure required in connection with cash solicitation arrangements) and Exchange Act Rules 10b-10 (delivery of confirmations), 10b-16 (disclosure of credit terms of margin loans), and 11Ac1-3 (account statement disclosing broker-dealer's policy regarding payment for order flow and its order routing policies), and Rule 15c3-2 (notification of free credit balance, that the broker-dealer may use that free credit balance in its business operations, and that the funds are payable upon demand of the customer).
14. 1995 Release at \*4.
15. *Id.* at \*6.
16. See 2000 Release.
17. *Id.* at \*5.
18. *Id.* at \*6.
19. ESIGN § 101(a)(1).
20. ESIGN § 101(a)(2).
21. ESIGN § 101(d)(1). Moreover, ESIGN further provides that, if a record is required by law to be in writing, the legal effect, validity or enforceability of an electronic record of such record may be denied if such electronic record is not in a form that is (1) capable of being retained, and (2) capable of being accurately reproduced for later reference by all parties or persons who are entitled to retain the record. See ESIGN § 101(e).
22. "Consumer" under ESIGN means "an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household

purposes, and also means the legal representative of such an individual." ESIGN Section 106(1).

23. ESIGN §§ 101(c)(1)(A) and 101(c)(1)(C)(ii).
24. ESIGN § 101(c)(1)(B).
25. ESIGN § 101(c)(1)(C)(i). If, after the consumer has consented, a change in hardware or software requirements needed to access or retain records electronically creates a material risk that the consumer will be unable to access or retain a subsequent electronic record that was the subject of the consent, the electronic record provider must (i) give the consumer a statement of the revised hardware and software requirements and his or her right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not previously disclosed; and (ii) again obtain the consumer's consent electronically. ESIGN § 101(c)(1)(D).
26. See Section 2 of the Standards and Procedures for Electronic Records and Signatures (SPeRS) Version 1.0 (2003). Even if a statute does not use the word "writing" or "written," if it is apparent that the information required to be provided or made available could only be provided in written form, then ESIGN consent procedures probably apply. See "The Law of Electronic Signatures and Records," Buckley, Tank *et al.* at pp. 2.2-18.
27. § 101(c)(3).
28. § 104(b).
29. § 104(b)(2).
30. § 104(d)(1).
31. § 104(d)(2).
32. ESIGN § 101(c)(1). A literal reading of the statutory language suggests that the demonstration requirement must be effected as part of the consent itself. See Buckley, Tank *et al.*, *supra* n.26, at pp. 2.2-20.
33. See 2000 Release at \*5.
34. Buckley, Tank *et al.*, *supra* n.26, at pp. 2.2-19
35. See *supra* n.17.
36. Buckley, Tank *et al.*, *supra* n.26, at pp. 2.2-20.
37. *Exemption From Section 101(C)(1) of the Electronic Signatures in Global and National Commerce Act for Registered Investment Companies*, Investment Company Act Release No. 24582 (July 27, 2000) (Rule 160 Release).
38. Rule 160 Release at \*3.
39. *Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signature in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, Exchange Act Release No. 44238 (May 1, 2001); *Electronic Recordkeeping by Investment Companies and Investment Advisers*, Investment Company Act Release No. 24991 and Investment Advisers Act Release No.1945 (May 24, 2001); *Recordkeeping Requirements for Transfer Agents*,



Exchange Act Release No. 44227 (April 27, 2001); *Application of the Electronic Signatures in Global and National Commerce Act to Record Retention Requirements Pertaining to Issuers under the Securities Act of 1933*, Securities Exchange Act of 1934 and Regulation S-T; Securities Act Release No.7985, Exchange Act Release No. 44424; Public Holding Utility Company Act Release No. 27419; and Investment Company Act Release No. 25003 (June 14, 2001).

40. Rule 206(4)-2.

41. See “Staff Responses to Questions about Amended Custody Rule,” question IV.1, citing the 1996 Release (updated Jan 10, 2005). The Staff’s response is consistent with the SEC’s statement in the 1996 Release that, unless it indicates otherwise, it intended the guidance to apply to all rules promulgated under the Exchange Act and Advisers Act, including rules promulgated subsequent to the issuance of the 1996 Release, requiring broker-dealers or investment advisers to deliver information to customer or clients. See 1996 Release at \*3.

42. See *supra* n.1.

43. Regulation S-P Section 248.9. See also Title V of the Gramm-Leach-Bliley Act authorizing financial institutions to provide notices of their privacy practices to consumers “in writing or, if the [c]onsumer agrees, electronically.”

44. See Letter from the SIA to Mr. Katz regarding Use of Electronic Media; File No. S7-11-00 (August 25, 2000) (“ESIGN did not preempt the SEC’s role as the regulator charged with interpreting the application of the [Securities] and 1934 Acts to the delivery of documents to investors... If the SEC does not agree with this interpretation of ESIGN, it should promptly utilize the interpretive rulemaking and exemptive authority provided in the legislation to clarify that existing rules, regulations and interpretations will remain in effect.”)

45. See *supra* n.39.

46. ESIGN § 101(c)(4).

47. 1996 Release at \*2. The SEC stated that its guidance applies only to federal securities laws and does not address or affect the applicability of any state laws. It also stated that its guidance did not apply to SRO rules, however, the NASD and the NYSE have each stated that members may electronically transit documents that they are required to furnish under their own rules provided members adhere to the standards contained in the Electronic Delivery Releases. See NASD Notice to Members 98-3, “Electronic Delivery of Information between Members and their Customers” (January 1998); NYSE Information Memo No. 97-32 “Electronic Delivery of Information to Customers by Members and Member Organizations” (June 13, 1997).

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