

**NOTICE OF REQUEST FOR PUBLIC COMMENT REGARDING A
PROPOSED STATEMENT OF POLICY REGARDING
THE USE OF ELECTRONIC OFFERING DOCUMENTS AND
ELECTRONIC SIGNATURES**

October 3, 2016

The Corporation Finance Section of the North American Securities Administrators Association (“NASAA”) is requesting public comment on a proposed Statement of Policy Regarding Use of Electronic Offering Documents and Electronic Signatures (“Statement of Policy”). This proposal is a second request for public comment following the feedback received from the Electronic Initiatives proposal released for public comment in May of 2016.

Comments are due by November 2, 2016. To facilitate consideration of comments, please send comments to Bill Beatty (Bill.Beatty@dfi.wa.gov), Chair of the Corporation Finance Section; Dan Matthews (Dan.Matthews@dfi.wa.gov), Chair of Business Organizations and Accounting Project Group; Anya Coverman (nasaacomment@nasaa.org), Deputy Director of Policy and Associate General Counsel; and Mark Stewart (nasaacomment@nasaa.org), Counsel at the NASAA Corporate Office. We encourage, but do not require, comments to be submitted by e-mail. Hard copy comments may be submitted at the address below.

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Note: After the comment period has closed, NASAA will post to its website the public comments it receives as submitted by the authors. Parties should therefore only submit information that they wish to make publicly available. Further, the following notice will appear on NASAA’s website where comments are posted: NASAA, its agents, and employees accept no responsibility for the content of the comments posted on this Web page. The views, expressions, and opinions expressed in the comments are solely those of the author(s).

Discussion and Analysis

The NASAA Corporation Finance Section Committee has drafted a proposed Statement of Policy Regarding Use of Electronic Offering Documents and Electronic Signatures.

As technology continues to progress and permeate through more aspects of the securities industry, it has become increasingly important for state regulators to address the appropriate use of technology when conducting a securities offering. Several issuers have begun implementing technologies that allow prospective investors to receive electronic offering documents and electronic subscription agreements, as well as the ability to execute these documents using an electronic signature. These issuers have sought relief through various methods, including

requesting no-action relief, to receive state approval of these initiatives. As more issuers seek to implement similar programs, the Section is proposing this Statement of Policy to provide a tool that allows NASAA jurisdictions to establish uniform guidelines to govern these initiatives and to streamline the process for industry participants.

This proposed Electronic Initiatives Statement of Policy addresses the requirements and restrictions to which an issuer is subject to should they choose to engage in an electronic initiative, such as providing offering documents and/or subscription agreements electronically, as well as allowing these documents to be executed using an electronic signature.

As part of drafting the Statement of Policy, several sources were considered, including Securities and Exchange Commission Release No. 34-51982¹; Securities Act Releases 7233,² 7288,³ and 7856;⁴ FINRA Interpretive Letter to Jeffrey W. Kilduff, Esq., O'Melveny & Myers, LLP (July 5, 2001);⁵ NASAA Statement of Policy Regarding Electronic Delivery of Franchise Disclosure Documents;⁶ no action requests and other correspondence from a variety of law firms representing securities issuers; and input from several NASAA jurisdictions.

The proposed Statement of Policy Regarding Use of Electronic Offering Documents and Electronic Signatures is attached as Exhibit A.

¹ SEC Securities Exchange Act of 1934 Release No. 51982 (July 7, 2005), *Available at:* <https://www.sec.gov/litigation/suspensions/34-51982.pdf>

² 60 Fed. Reg. 53467 (October 6, 1995), *Available at:* <https://www.sec.gov/rules/concept/33-7233.txt>

³ 61 Fed. Reg. 24651 (May 15, 1996), *Available at:* <https://www.sec.gov/rules/concept/33-7288.txt>

⁴ 65 Fed. Reg. 25843 (April 28, 2000), *Available at:* <http://www.sec.gov/rules/concept/34-42728.htm>

⁵ FINRA Interpretive Letter to Jeffrey W. Kilduff, Esq., O'Melveny & Meyers, LLP, dated July 5, 2001, from Nancy Libin, FINRA Assistant General Counsel (regarding electronic signatures: request for interpretive letter NASD Rules 3010(d) and 3110(c)(1)(C)), *Available at:* <https://www.finra.org/industry/interpretive-letters/july-5-2001-1200am>

⁶ NASAA Statement of Policy Regarding Electronic Delivery of Franchise Disclosure Documents (September 14, 2003), *Available at:* <http://www.nasaa.org/wp-content/uploads/2011/07/34-Electronic-Delivery-Franchise-Disclosure.pdf>

Exhibit A

NASAA STATEMENT OF POLICY REGARDING
USE OF ELECTRONIC OFFERING DOCUMENTS
AND ELECTRONIC SIGNATURES

I. TEXT OF PROPOSED POLICY REGARDING USE OF ELECTRONIC OFFERING DOCUMENTS AND SUBSCRIPTION AGREEMENTS

A. An issuer of securities or agent acting on behalf of the issuer may deliver Offering Documents over the Internet or by other electronic means, or in machine-readable format, provided:

1. each Offering Document:

- a. is prepared, updated, and delivered in a manner consistent and in compliance with state and federal securities laws;
- b. satisfies the formatting requirements applicable to printed documents, such as font size and typeface, and which is identical in content to the printed version (other than electronic instructions and/or procedures as may be displayed on the electronic format);
- c. is delivered as a single, integrated document or file; when delivering multiple Offering Documents, the documents must be delivered together as a single package or list;
- d. where a hyperlink to documents or content that is external to the offering documents is included, provides notice to investors or prospective investors that the document or content being accessed is provided by an external source; and
- e. is delivered in an electronic format that intrinsically enables the recipient to store, retrieve, and print the documents;

AND

2. the issuer or agent acting on behalf of the issuer:

- a. obtains informed consent from the investor or prospective investor to receive Offering Documents electronically;
- b. ensures that the investor or prospective investor receives timely, adequate, and direct notice when an electronic Offering Document has been delivered;
- c. employs safeguards to ensure that delivery of Offering Documents occurred at or before the time required by law in relation to the time of sale; and
- d. maintains evidence of delivery by keeping records of its electronic delivery of Offering Documents and makes those records available on demand by the securities administrator.

B. Subscription agreements may be provided by an issuer or agent acting on behalf of the issuer electronically for review and completion, provided the subscription process is

administered in a manner that is similar to the administration of subscription agreements in paper form, as follows:

1. before completion of any subscription agreement, the issuer or agent acting on behalf of the issuer must: (i) review all documentation with the prospective investor, (ii) discuss investment options dependent upon suitability, and (iii) review the documents and instructions on how to complete the subscription agreement;
 2. mechanisms are established to ensure a prospective investor reviews all required disclosures and scrolls through the document in its entirety prior to initialing and/or signing; and
 3. unless otherwise allowed by the securities administrator, a single subscription agreement is used to subscribe a prospective investor in no more than one offering.
- C. In the event of discovery of a Security Breach at any time in any jurisdiction, the issuer or its agents, as appropriate, will take prompt action to (i) identify and locate the breach, (ii) secure the affected information, (iii) suspend the use of the particular device or technology that has been compromised until information security has been restored, and (iv) provide notice of the security breach to any investor whose confidential personal information has been improperly accessed in connection with the security breach and to the securities administrator of each state in which an affected investor resides. Compliance with this section after the discovery of a Security Breach, or any other breach of personal information, shall not substitute or in any way affect other requirements or obligations, including notification, imposed on an issuer or its agents pursuant to applicable laws, regulations, or standards.
- D. Delivery requires that the offering documents be conveyed to and received by the investor or prospective investor, or that the storage media in which the offering documents are stored be physically delivered to the investor or prospective investor in accordance with subsection (A)(1).
- E. Each electronic document shall be preceded by or presented concurrently with the following notice: **“Clarity of text in this document may be affected by the size of the screen on which it is displayed.”**
- F. Informed consent to receive offering documents electronically pursuant to (A)(2)(a) in this section may be obtained in connection with each new offering, or by an agent acting on behalf of the issuer.¹ The investor may revoke this consent at any time by informing the party to whom the consent was given, or, if such party is no longer available, the issuer.
- G. Investment opportunities shall not be conditioned on participation in the electronic offering documents and subscription agreements initiative.

¹ SEC Release No. 34-42728 provides the following guidance with respect to informed consent: “Generally, a consent is considered to be informed when an investor is apprised that the document to be provided will be available through a specific electronic medium or source . . . and that there may be costs associated with delivery In addition, for a consent to be informed an investor must be apprised of the time and scope parameters of the consent.”

- H. Investors or prospective investors who decline to participate in an electronic offering documents and subscription agreements initiative shall not be subjected to higher costs—other than the actual direct cost of printing, mailing, processing, and storing offering documents and subscription agreements—as a result of their lack of participation in the initiative, and no discount shall be given for participating in an electronic offering documents and subscription agreements initiative.
- I. Entities participating in an electronic initiative shall maintain, and shall require participating underwriters, dealer-managers, placement agents, broker-dealers, and/or other selling agents to maintain, written policies and procedures covering the use of electronic offering documents and subscription agreements.
- J. Entities and their contractors and agents having custody and possession of electronic offering documents, including electronic subscription agreements, shall store them in a non-rewriteable and non-erasable format.
- K. This section does not change or waive any other requirement of law concerning registration or presale disclosure of securities offerings.

II. TEXT OF PROPOSED POLICY REGARDING USE OF ELECTRONIC SIGNATURES

- A. An issuer of securities or agent acting on behalf of the issuer may provide for the use of electronic signatures provided:
 - 1. The process by which electronic signatures are obtained:
 - a. will be implemented in compliance with the Electronic Signatures in Global and National Commerce Act (“Federal E-Sign”) and the Uniform Electronic Transactions Act, including an appropriate level of security and assurances of accuracy, and where applicable, required federal disclosures;
 - b. will employ an authentication process to establish signer credentials and security features that protect signed records from alteration; and
 - c. will provide for retention of electronically signed documents in compliance with applicable laws and regulations, by either the issuer or agent acting on behalf of the issuer;
 - 2. An investor or prospective investor shall expressly opt-in to the electronic signature initiative, and participation may be terminated at any time; and
 - 3. Investment opportunities shall not be conditioned on participation in the electronic signature initiative.
- B. Entities that participate in an electronic signature initiative shall maintain, and shall require underwriters, dealer-managers, placement agents, broker-dealers, and other selling agents to maintain, written policies and procedures covering the use of electronic signatures.
- C. An election to participate in an electronic signature initiative pursuant to (A)(2) in this section may be obtained in connection with each new offering, or by an agent acting on behalf of the issuer. The investor may revoke this consent at any time by informing the party to whom the consent was given, or, if such party is no longer available, the issuer.

III. DEFINITIONS OF TERMS USED IN PROPOSED POLICY REGARDING USE OF ELECTRONIC OFFERING DOCUMENTS AND ELECTRONIC SIGNATURES

A. The following terms are defined for purposes of this Statement of Policy:

1. “Offering documents” include, but are not limited to, the registration statement, prospectus, applicable agreements, charter, by-laws, opinion of counsel and other opinions, specimen, indenture, consent to service of process and associated resolution, sales materials, subscription agreement, and applicable exhibits.
2. “Sales materials” include only those materials to be used in connection with the solicitation of purchasers of the securities approved as sales literature or other related materials by the SEC, FINRA, and the States, as applicable.
3. “Security Breach” shall mean the unauthorized accessing, viewing, acquisition, or disclosure of any data that compromises the security or confidentiality of confidential personal information maintained by the person or business; provided, however, that for this purpose a “security breach” shall relate only to a system, technology, or process that is used in connection with or introduced into a securities offering in order to implement the use of electronic offering documents and/or electronic signatures.