
An End to the Paper Chase? Proposed Bill Could Greatly Expand SEC Registrants' E-Delivery Use.

The House Committee on Financial Services passed the Improving Disclosure for Investors Bill of 2023 on April 26, 2023 with bipartisan support. If passed by Congress and signed into law, the bill could alter the regulatory landscape for electronic delivery (e-delivery) by US Securities and Exchange Commission (SEC) registrants by eliminating the requirement to obtain an investor's affirmative consent for e-delivery and allowing firms to implement a notice and optout approach to implementing e-delivery.

E-delivery of required regulatory documents to investors has been permitted for decades under SEC guidance from 1995 and the Electronic Signatures in Global and National Commerce Act (E-SIGN) enacted in 2000. However, the requirement in the SEC's guidance and E-SIGN to obtain a person's consent to e-delivery, combined with practical difficulties in obtaining such consent, has greatly limited how broadly SEC registrants have been able to implement e-delivery across their businesses. (The SEC's e-delivery guidance does not require consent to e-delivery if the SEC registrant has a reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws. The SEC's guidance states that obtaining an investor's informed consent to e-delivery through a particular medium would constitute satisfactory evidence of delivery.)

Key Features

- **Scope.** The bill would apply to "covered entities," including registered investment advisers, broker-dealers, investment companies, municipal securities dealers, transfer agents, and funding portals, and business development companies that elect to be regulated as registered investment companies, and their delivery of "regulatory documents" that are required to be delivered under the US federal securities law (including prospectuses, shareholder reports, confirmations, customer account statements, Form CRS, Form ADV Part 2, and privacy notices, among others).
- **Affirmative consent not required.** The bill would preempt existing requirements under E-SIGN to obtain a person's affirmative consent to e-delivery (as well as other procedural aspects of E-SIGN) and allow covered entities to, subject to certain requirements, use e-delivery as their default method of delivering regulatory documents, unless an investor opts out.
- **Notice and optout process.** The bill requires the SEC to adopt rules setting forth a process that would permit covered entities to transition investors to e-delivery of all regulatory documents by (1) delivering an initial communication, in paper form, about e-delivery, (2) observing a transition period (not to exceed 180 days), and (3) delivering an annual notice (for a period not to exceed two years) in paper form reminding investors of their right to opt out of e-delivery. Investors would have a right to opt out of e-delivery at any time.
- **Permitted means of e-delivery.** Permitted means of e-delivery would include (1) direct delivery to an investor's electronic address, (2) posting the regulatory document to a website in conjunction with the direct e-delivery to the investor of a notice of the availability of the regulatory document, and (3) other electronic methods reasonably designed to ensure the investor's receipt of the regulatory document.

- **SEC rulemaking.** The SEC would be required to propose rules covering the above (as well as requirements around remediation of failed e-delivery and certain other details) within 180 days of enactment of the bill and finalize such rules within one year of the enactment of the bill. If the SEC fails to adopt rules by this deadline, the provisions of the bill would become automatically effective.

Commentary

While the fate of the bill remains to be seen, if signed into law, it could dramatically expand the use of e-delivery by SEC registrants. We would expect many firms to take advantage of the bill, and the notice and optout process set forth in the bill would likely yield much higher adoption of e-delivery by investors.

While the bill would represent a significant modernization of the e-delivery requirements under the US federal securities laws, it would not solve all practical and interpretive challenges of e-delivery. Notably, it is not clear what direct delivery to an “electronic address” might encompass, and the definition of e-delivery in the bill likely would not extend to delivery of regulatory documents to investors by posting them on a website without some form of direct notice to the investor. What would satisfy these standards could be open to interpretation, and different types of investors obtaining services from different types of financial institutions may reasonably have different expectations (e.g., would an in-app popup notification constitute good delivery?).

In addition, many firms may not have email addresses (or equivalent means of direct electronic communication) for certain legacy customers and may have difficulty obtaining them from others. As such, it may be advisable for firms to undertake broader efforts to obtain email addresses from investors now, even if they are unsure whether they would rely on e-delivery with those investors at this time.

Some lawmakers and investor advocacy groups have raised concerns about the bill, particularly its impact on seniors, and the SEC may share some of those concerns. While the SEC could potentially use its rulemaking authority to address some of those concerns if the bill is signed into law, the bill limits the extent of the SEC’s rulemaking authority.

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