



C.L. "BUTCH" OTTER
Governor

GAVIN M. GEE
Director

December 10, 2015

Re: Request for No-Action Letter Regarding Electronic Signature Program

Dear _____ :

This is in response to your request for a "no-action" position on behalf of your client, _____) concerning the proposed use of an electronic document delivery program and electronic signature which may be implemented in Idaho under the terms and conditions described in your October 15, 2015 letter. Based on your representations, this Department will provide an opinion concerning whether or not the proposed program violates provisions of the Idaho Uniform Securities Act (2004) (IUSA). A copy of your letter is attached to this response.

Regulatory Background

As explained in your letter, within Section I, pages 1-3, federal law under the Electronic Signatures in Global and National Commerce Act (ESIGN) governs usage of electronic signatures and records in commercial transactions and gives broad legal recognition to electronic signatures and also governs interstate and international electronic transactions. Since the passage of ESIGN, the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA formerly NASD) conditionally approved the use of electronic signatures in a retail context subject to various safeguards (Section IV of attached letter) required under its written guidance. Your letter includes references to SEC and FINRA guidance associated with the distribution and use of electronic documents.

You have cited the Uniform Electronic Transactions Act (UTEA) as model state law that was proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which broadly recognizes the validity of electronic signatures. Forty-seven states, including Idaho, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, have adopted UTEA.

It is also _____ position that there is no distinction under NASAA Statements of Policy Regarding Omnibus Guidelines between paper and electronic subscription agreements so

SECURITIES BUREAU

Bureau Chief – James A. Burns

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long as the provision for a “completion of sale” is satisfied, this Statement of Policy which applies to Business Development Companies, the use of electronic prospectuses, subscription agreements and signatures is permitted.

E-Signature Program

Section II of your correspondence describes the E-Signature Program (the Program) as compliant with ESIGN, UETA, NASAA Statement of Policy regarding Omnibus Guidelines, SEC guidance. This Section also describes the means of delivery and execution of the electronic documents.

The terms and conditions of the Program are stipulated within the ten bullet items on pages 4-5 of your correspondence which include Broker Dealer/Registered Investment Adviser Firm (BD/RIA) accountability for investor authentication which are consistent with FINRA’s Know-Your-Customer and the Customer Identification Program requirements of the USA Patriot Act. Document delivery is consistent with state and federal legibility requirements. The Program will require investors to “opt into” the Program. An investor may terminate participation in the E-Signature Program at any time.

will not use multi-offering subscription agreements. After e-signing, documents will be routed to BD/RIA for review, approval and storage in compliance with rules pursuant to the Securities and Exchange Act of 1934. As follow-up, the investor receives copies of all documents from the BD/RIA to the investor in accordance with their preference for either electronic or hard-copy documents.

NASAA Compliance

Section III on pages 5 and 6 of your letter indicates the Program will meet requirements under the NASAA Statement of Policy Regarding Omnibus Guidelines and the prospectus will include disclosure information that the subscription agreement may be completed by a prospective investor in either paper or electronic form. The representations in your letter stipulate that there are no material differences in document content, regulatory oversight or protocol for use of electronic or hard copy documents.

Safeguards

The six itemized bullet points describing Program safeguards within Section IV on pages 6 and 7 appear reasonable and consistent with SEC and FINRA guidance for privacy, security and record keeping requirements for hard-copy documents.

Request For No-Action

Based on the representations within the attached correspondence, the Program does not appear to violate the provisions of the IUSA.

The Department’s position is based solely on representations and facts presented in the October 15, 2015 letter sent to us on behalf of your client, . Any different facts or circumstances may require a different conclusion. We direct your attention to the anti-fraud provisions of the IUSA and emphasize that and any registered broker-dealers

who may offer or sell securities in Idaho on behalf still have the responsibility for compliance with these and other provisions of the IUSA.

Sincerely,

A handwritten signature in blue ink, appearing to read "W. Bitner". The signature is fluid and cursive, with a large initial "W" and a long, sweeping underline.

Walt Bitner
Securities Analyst

RECEIVED

OCT 19 2015

DEPARTMENT OF FINANCE
STATE OF IDAHO

October 15, 2015

Jim Burns
Securities Chief
Department of Finance
800 Park Boulevard, Suite 200
Boise, ID 83712

VIA FEDERAL EXPRESS

Re: Request for No-Action Letter Regarding Electronic Signature Program

Dear Mr. Burns:

This letter serves as a request for a no-action letter from the Idaho Department of Finance (the "Department") that the proposed launch of an electronic signature and electronic document delivery program for use with certain investment products (the "E-Signature Program") may be implemented in Idaho on the terms described below. This letter is being submitted on behalf of our client,

”). Enclosed in connection with this request is a check in the amount of \$50 in payment of the Department's opinion fee.

is preparing to launch the E-Signature Program in public offerings of non-traded investment products, such as business development companies ("BDCs"). The E-Signature Program will allow for the use of electronic signatures on subscription agreements as well as the electronic delivery of prospectuses and other documents. We believe the E-Signature Program will create significant efficiencies and cost-savings that will benefit the investors in these offerings.

I. REGULATORY BACKGROUND

The Electronic Signatures in Global and National Commerce Act ("ESIGN")¹ and the Uniform Electronic Transactions Act ("UETA")² are the primary laws governing the use of electronic signatures and records in commercial transactions. ESIGN is a federal law that gives broad legal recognition to electronic signatures and governs interstate and international electronic transactions, including that a contract or signature "may not be denied legal effect, validity, or enforceability solely because it is in electronic form."³

¹ Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 *et seq.*)

² Uniform Electronic Transactions Act (1999).

³ 15 U.S.C. § 7001(a)(1).

Similarly, UETA is a model state law that was proposed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). UETA broadly recognizes the validity of electronic signatures. Idaho and 46 other states, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, have adopted UETA. A state that enacts anything other than the official version of UETA is preempted to the extent that the law conflicts with ESIGN. Thus, the legal landscape governing electronic signatures is now consistent within and across states and at the federal level.

Since the passage of ESIGN, the Securities and Exchange Commission (“SEC”) has recognized that ESIGN generally superseded pre-existing regulatory requirements that records created in a business, consumer, or commercial transaction must be kept in paper form. Both the SEC and the Financial Industry Regulatory Authority (“FINRA”) have provided guidance on what they consider to be necessary safeguards for an electronic signature program, and both have approved the use of electronic signatures in a retail context.⁴

Similarly, the SEC, through a series of interpretive releases, has provided guidance regarding the electronic delivery of required information, including prospectuses, annual reports and proxy solicitation materials.⁵ Federal securities laws do not prescribe the medium for providing prospectuses to prospective purchasers. The SEC has instructed that electronic delivery is permissible if informed consent is given and the issuer demonstrates that the proposed electronic delivery provides (1) timely and adequate notice that the information is available, (2) access to the electronic documents is comparable to that provided by postal mail and (3) evidence of delivery. Through these releases, the SEC has indicated that an investor may consent to electronic delivery of materials so long as the consent is informed.

Based on our review of the NASAA Omnibus Guidelines (the “Omnibus Guidelines”),⁶ we believe that no prohibition on the use of e-signatures or e-prospectuses exists thereunder. The Omnibus Guidelines require that a prospectus comply with

⁴ See Securities and Exchange Commission Release No. 34-51983 (Sept. 12, 2005), Amendments to the Penny Stock Rules; *see also* FINRA Interpretive Letter to Jeffrey W. Kilduff, Esq. (July 5, 2001), Permissibility of Electronic Signatures under NASD Rules 3010(d) and 3110(c)(1)(C).

⁵ See 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”).

⁶ The Omnibus Guidelines were adopted by NASAA membership on March 29, 1992, and were amended on May 7, 2007. The Omnibus Guidelines are applied by certain states in their review of securities registrations filed by BDCs.

applicable sections of the Securities Act of 1933 (the "1933 Act"), and generally define "prospectus" as "any document by whatever name known, utilized for the purpose of offering and selling securities to the public."⁷ While the context of the Omnibus Guidelines clearly anticipates written prospectuses, the Omnibus Guidelines are silent on the format or medium of the writing, and they do not specify as between paper or electronic documents. Similarly, Omnibus Guideline III.D.1 provides that "The ADMINISTRATOR may require that each PARTICIPANT complete and sign a written subscription agreement." However, no distinction is made between paper and electronic subscription agreements. In our opinion, so long as the Omnibus Guideline III.E.1 "completion of sale" provision is satisfied, the Omnibus Guidelines permit the use of electronic prospectuses and electronic subscription agreements.

II. CRITICAL TERMS OF E-SIGNATURE PROGRAM

E-Signature Program will consist of two primary components, (1) electronic delivery of documents such as the prospectus, and (2) electronic execution of subscription agreements. The delivery of electronic documents may be completed through any commonly used means, but specifically including (1) emailing to the investor⁸ a link to a webpage containing the electronic document, or (2) delivering a USB drive or other storage device to the investor which contains a link to a webpage containing the electronic document. The electronic signing of documents generally will require the investor to (1) be properly "authenticated" by his or her broker-dealer or registered investment adviser, (2) sign into a password protected website, (3) scroll through each page of the subscription agreement and affix his or her signature or initials to each item requiring completion, and (4) upon completing the electronic form, affirmatively submit the document. At any time prior to submission of the completed electronic subscription agreement, the investor may instead opt to manually sign a paper subscription agreement.

The E-Signature Program will be designed to comply with ESIGN, UETA, applicable provisions of the Omnibus Guidelines, and guidance provided by the SEC with respect to the electronic delivery of offering documents. In particular, the E-Signature Program will satisfy the following requirements:

⁷ Omnibus Guidelines I.B.23 and VII.B.1.

⁸ As used herein, we define "investor" to also include a prospective investor.

- Investors will be advised that participation in the E-Signature Program is optional and that agreeing to participate in the E-Signature Program is not a condition for participation in any investment.
- Investors must expressly opt into the E-Signature Program to participate. Any investor who opts not to participate or who fails to make an election will continue to execute paper subscription agreements and receive all documents in paper form.
- There will be no difference in cost to the investor regardless of whether he or she participates in the E-Signature Program.
- The same investment opportunities will be available to investors, regardless of whether they participate in the E-Signature Program.
- Investors may change their election or terminate their participation in the E-Signature Program at any time.
- Each investor that elects to participate in the E-Signature Program must be “authenticated.” Generally, authentication refers to the process by which an investor’s broker-dealer or registered investment adviser (collectively, “BD/RIAs”) confirms the identity and contact information of the investor and establishes unique log-in credentials for the investor to use to access electronic documents and/or subscription agreements. Through this process, which will be managed by the BD/RIAs that participate in an offering, each investor will provide information to his or her BD/RIA that will be used to confirm the investor’s identity and authority to sign. Generally, this information will be consistent with FINRA’s Know-Your-Customer obligations and will comply with the Customer Identification Program requirements of the USA Patriot Act.
- The prospectus will be delivered to investors who elect to receive documents electronically in a manner that is consistent with applicable provisions of state and federal securities laws. In particular, prospectuses will satisfy the legibility requirements applicable to printed documents, including page size, type size, font, bold-face type, italics and type color.
- Following authentication, the prospectus and subscription agreement will be provided electronically to investors who elect to participate in the E-

Signature Program for review, and with respect to the electronic subscription agreement, completion, e-signing and initialing of all appropriate representations in a manner that is comparable to the handling of subscription agreements in paper form.

- After e-signing, an investor's electronic subscription will be routed to the books and records system of his or her BD/RIA for review, approval, routing and storage in compliance with Rules 17a-3 and 17a-4 of the Securities Exchange Act of 1934. A copy of the investor's electronically-signed documents will also be made available by the BD/RIA to the investor in the investor's preferred form, electronic or hard-copy.
- does not utilize multi-offering subscription agreements currently, and will not use multi-offering subscription agreements as part of the E-Signature Program.

III. NASAA COMPLIANCE

The prospectus covering any offering in which e-signatures are to be used will comply with Omnibus Guideline VII.B relating to the form and contents of the prospectus, and will contain disclosure about the E-Signature Program. The e-signature disclosure will explain that the subscription agreement (a specimen of which will be attached as an appendix to the prospectus) may be completed by a prospective investor in either paper or electronic form.

A specimen of the subscription agreement will be filed as part of the Registration Statement that relates to a particular offering. The subscription agreement will therefore be subject to review and approval by the SEC, FINRA and each state, thereby ensuring compliance with applicable federal and state securities laws. In particular, the subscription agreements for BDCs will comply with Omnibus Guideline III.D relating to the form and contents of subscription agreements.

Electronic versions of the prospectus, subscription agreement, and other documents will replicate their hard-copy counterparts to the greatest extent possible. While the content of both electronic and paper versions will be identical, small differences with respect to formatting, for example, may be necessary due to the difference in medium.

Whether an investor uses the electronic or hard-copy process, similar compliance and supervisory protocols will apply in order to achieve the same review and oversight results. These protocols will ensure that, among other things, (1) a sale is not completed

until at least five business days after the date the prospective investor receives the final prospectus in accordance with Omnibus Guideline III.E.1, (2) an investor shall receive confirmation of his or her purchase in accordance with Omnibus Guideline III.E.2 and (3) records of suitability determinations are maintained in accordance with Omnibus Guideline III.C.4.

IV. SAFEGUARDS OF E-SIGNATURE PROGRAM

The SEC and FINRA have each stated that electronic recordkeeping programs must provide for the same level of security, accuracy and accessibility as are provided with respect to paper records. We expect that in many situations the security of information and the ability to accurately and efficiently maintain, sort and retrieve information will be enhanced through the use of the Electronic-Signature Program.

Safeguards that are designed to comply with privacy, security and recordkeeping requirements include:

- Documents requiring an investor's electronic signature as part of the E-Signature Program may be accessed by investors only through a password-protected website.
- Each investor that elects to participate in the E-Signature Program must be authenticated by his or her BD/RIA.
- The selected dealer, registered investment adviser, or comparable agreement between affiliated dealer manager and a BD/RIA that participates in the Electronic-Signature Program will require the BD/RIA to confirm their compliance with all applicable recordkeeping obligations under the securities laws and FINRA regulations.
- The selected dealer, registered investment adviser, or comparable agreement between affiliated dealer manager and a BD/RIA that participates in the Electronic-Signature Program will require the BD/RIA to confirm their compliance with all applicable suitability obligations under the securities laws and FINRA regulations.
- The selected dealer, registered investment adviser, or comparable agreement between affiliated dealer manager and a BD/RIA that participates in the Electronic-Signature Program will require the BD/RIA to

Jim Burns
October 15, 2015
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maintain written policies and procedures covering their use of e-signatures and the electronic delivery of documents.

- Technology used in the Electronic-Signature Program will require that the investor separately sign or initial each item requiring completion in the subscription agreement in accordance with Omnibus Guideline III.D.3. Investors will be required to scroll to the bottom of each page of the subscription agreement before being able to advance to the next page.

V. REQUEST FOR NO-ACTION LETTER

Based on the foregoing, _____ requests a no-action letter confirming that the E-Signature Program may be implemented in Idaho. Please contact the undersigned at _____ should you have questions or require additional information.

We appreciate your consideration of this matter.

Yours truly,