ELECTRONIC COMMERCE & REGULATION ISSUE PAPER
Electronic Commerce & Regulation
Issues Paper

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NAIC
National Association
Of Insurance Commissioners
The Electronic Commerce and Regulation Working Group was appointed by the (EX) Special Committee on Regulatory Re-engineering at the 1998 Spring National Meeting. The charges given to the working group can be divided into two separate but complementary areas: (1) Electronic Regulation, which involves the interaction between insurers and regulators, and among regulators, and (2) Electronic Commerce, which involves the interaction between and among insurers, providers, policyholders, and related third parties. Specifically the charges are:

**Electronic Regulation:**
- Evaluate methods by which the Internet and other means of electronic commerce can be used to increase efficiencies in the regulation of insurance and make specific recommendations by the 1999 Fall National Meeting.

**Electronic Commerce:**
- Develop specific recommendations to update and, where appropriate, harmonize state laws, regulations and procedural requirements governing the insurance industry; to facilitate the use of beneficial electronic commerce by insurers; to allow continuous improvement in cost/quality of access, delivery and administration of insurance products and services; and to maintain or improve appropriate consumer protections.

The first charge is shared with several other NAIC working groups and is being coordinated under the (EX) Special Committee on Regulatory Re-engineering. Because of the substantive work already being done by other working groups on specific NAIC initiatives, such as PIN, IRIN, and SERFF, the working group views its role to be the identification and evaluation of new or innovative ways to achieve efficiencies in the regulatory process through the use of technology.

With respect to electronic regulation, the working group recognizes that several other projects are underway within the NAIC committee structure that deal with the use of electronic methods of facilitating the regulation of insurance. The working group will seek to coordinate with such other NAIC efforts in making its recommendations.

**Charge 1: Electronic Regulation**

With respect to the first charge, the collaborative efforts of the states in achieving efficiencies in electronic regulation is an important element in keeping state regulation of insurance responsive to consumer demands faced by regulated insurers. In this light, the NAIC is pursuing IRIN, PIN, SERFF, and other initiatives to facilitate collaborative, efficient regulatory processes.

**Regulatory Filings**

The working group notes that there are opportunities to remove barriers that impede the beneficial use of technology in the regulatory process. For example, in the area of electronic payments, some states have implemented the System for Electronic Rate Form Filings (SERFF) and permit the commissioner to accept filings in electronic form. Some states that accept SERFF filings require that a check for payment of filing or retaliatory fees be mailed to the department of insurance prior to consideration of the filing.

**Agent and Broker Licensing and Appointments**

With the implementation of the Producer Information Network (PIN), the processing of agent appointments and licenses may be done electronically. A barrier to the implementation of PIN, however,
is the requirement in some states that a check in the amount of the fee be paid before the transaction may be completed.

**Continuing Education**

Nearly every state requires licensed insurance producers to satisfy a periodic continuing education (CE) requirement, and agents and brokers typically receive CE credit by attending education or training sessions that are approved by the states. States normally require in-person attendance at approved classes, meetings, and seminars, in order to ensure that the individual has satisfied the applicable CE credit.

The working group will study (1) whether computer-based CE will likely become available for use by agents and brokers, (2) whether technology is available to verify completion of CE requirements by brokers and agents through computer-based means, and (3) whether the use of this new technology better utilizes regulatory resources in ensuring CE compliance.

**Payment of Fees/Electronic Funds Transfer**

A few states affirmatively authorize the insurance commissioner (or more commonly, the commissioner of revenue) to require or accept payments of fees or taxes by electronic funds transfer (EFT). However, newer forms of electronic payment, such as electronic checks, may not be permitted even under these EFT enabling statutes.

A Connecticut statute applying to the Commissioner of Revenue Services might serve as a model for payment of fees by insurers to insurance departments. The statute gives the Commissioner the authority to require “the filing, by computer transmission or by employing new technology as it is developed, of any return, statement or to other document that is required by law or regulation to be filed with said commissioner”… and permits any person “to pay any tax, to which such return, statement or other document pertains, by electronic funds transfer”… and further permits the commissioner to “prescribe alternative methods for the signing, subscribing or verifying of such return” and “permit the payment of any tax… by use of any new technology as it is developed.”

The working group will continue to explore alternatives for fee payments that will encourage and facilitate electronic transmission of funds, thereby enhancing utilization of SERFF, PIN, and other State Regulation 2000 initiatives.

**Charge 2: Electronic Commerce**

**Foundations of Electronic Commerce in Insurance**

The term “electronic” is generally defined as “of or relating to technology having electrical, digital, magnetic, optical, or similar capabilities regardless of medium.” (H.R. 1714). The definition of “commerce” is the “exchange or buying of and selling of goods and services, between people, entities, places, or communities.” Thus electronic commerce is simply conducting commerce by electronic means. In the insurance industry, the conduct of commerce is governed by laws and regulations specific to each state or territory or possession, which places the conduct of electronic insurance commerce in a unique context.
Insurance laws and regulations have developed over a long period, during most of which the means of conducting commerce was person to person and based on paper documentation. The business of insurance has developed over time, responding to specific needs. This has resulted in a significant diversity of application of terms depending on their historical context. For example, in insurance law, terms like “signature,” “signed,” “writing,” “attached,” “offered,” “delivered or issued,” “received,” and “acceptance” may have different meanings and application depending upon their contextual application in the relevant state law or regulation. Moreover, “wet” signature requirements and requirements that documents be “date stamped,” delivered by certified or registered mail, or otherwise handled in physical form can create a barrier to the use of electronic signatures and records.

Scope of Electronic Commerce

For the purposes of this paper, “electronic commerce” includes a broad category of activities that allow goods and services to be marketed, selected, purchased, received, or serviced using, in all or in part, electronic based technologies. Electronic technologies can include, but are not limited to:

- the electronic transmission of data including transmission via telephones, electronic mail (e-mail), facsimile, File Transfer Protocol (FTP) or any other transmission of data over communications lines;
- use of the Internet, intranets, extra-nets or proprietary or public standards-based Electronic Data Interchange (EDI) networks, or other public or private networks;
- digital, magnetic, and other forms of imaging;
- electronic funds transfer (EFT) including ACH, e-check, credit or debit cards and other established means of electronically transferring funds between two parties:
- television, radio, video, compact disc, or other broadcast media;
- interactive voice response (IVR) mechanisms;
- cellular, digital, infrared, and other wireless transmissions; or
- any other means of conducting business by transmitting, receiving and storing data in an electronic format.

General Approach

With respect to the working group’s second charge, to facilitate electronic commerce, the focus will be on the marketing, sale, delivery, service, and administration of insurance products and services using electronic means. This charge will require considerable effort and time to complete. This paper is a first step toward identifying and evaluating impediments and developing plan of action to remove or avoid adoption of unnecessary or artificial regulatory barriers that inhibit the beneficial use of electronic commerce in insurance.

Thus, the working group’s approach will be to:

1. identify state laws, regulations, and procedures that create barriers to the use of electronic means of conducting the business of insurance or otherwise impede insurers, producers, and consumers from using electronic commerce,
2. identify and evaluate the substantive policy objectives for such laws, regulations, or procedures, and
3. determine whether the objectives are necessary for consumer protection, and, if so, whether such objectives can be met without the barrier to electronic means while maintaining necessary consumer protections.
The working group considers the retention of necessary consumer safeguards to be a core principle and largely achievable through electronic means. In cases where the working group identifies a paper-based process that provides a necessary consumer safeguard, the working group will determine the objectives of the paper-based protection and will evaluate if an electronic process can effectively achieve the same objectives. If so, modifications will be recommended to acknowledge the acceptability of electronic or other than paper means to substantively implement the safeguard. In those cases where an electronic method can not achieve the essential objectives, the working group will recommend retention of that safeguard.

Rehabilitating, one at a time, statutes and regulations that have been identified as barriers to electronic commerce might take as long as the original enactments, and would be extremely costly in time and resources. The recommended approach is to enact legislation which globally allows the interpretation of existing statutes and regulations in such a way as to embrace electronic commerce technology. For example, legislation could be enacted to allow all statutory and regulatory requirements for handwritten signatures to appear on documents to be optionally satisfied by verifiable electronic signatures on electronic records.

The State of Arkansas recently enacted legislation that may be useful to other states looking for a way to make existing statutes and regulations more compatible with industry and regulatory uses of electronic commerce. In short, the new statute allows the commissioner to interpret the words “print,” “printed,” and “printing,” among others, to include an electronic printing form.

The working group has incorporated, where possible, any known references to works that have already been done that provide insight and/or definition for areas of discussion. These references include the NAIC white paper entitled The Marketing of Insurance Over the Internet and the Market Conduct Record Retention Model Regulation.

**Coordination with Federal Bills, National Model Acts:** More than thirty states have already enacted legislation addressing with the use of electronic signatures and/or electronic records in commerce. A handful of those statutes deal exclusively with private entities interacting with state agencies, but most apply generally (i.e., interaction between private entities and state agencies as well as interaction between and among private entities). Most of the state laws are technology neutral with regard to electronic signatures, although eleven states provide some preference for digital signatures, a specific technology, which is defined below.

The working group recognizes that proposals are currently under development or consideration in state legislatures and Congress. If adopted, most of these proposals will affect all commercial entities. For example:

- Recently, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Electronic Transactions Act (UETA) and has recommended adoption by all fifty states. California recently adopted UETA with significant modifications and other states are, or will shortly be, considering adoption. UETA will in most instances put electronic signatures and records on an even par with physical signatures and records unless other substantive law requires a paper physical medium.

- In addition to UETA, both chambers of Congress have passed alternative bills in this area, each of which applies to the business of insurance. These two bills, H.R. 1714 and S. 761, apply the essential elements of UETA to all commercial activities, including insurance. In their current
form these bills could preempt certain state electronic signature and/or records laws, unless a state adopts UETA or specifies alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures. H.R. 1714 does not apply to notice requirements concerning the cancellation or termination of health insurance or benefits or life insurance benefits.

Both the federal bills and UETA provide a uniform approach to reducing barriers to the use of electronic signatures and records. H.R. 1714 states that:

“With respect to any contract, agreement, or record entered into or provided in, or affecting interstate commerce or foreign commerce, notwithstanding any statute, regulation, or other rule of law, the legal effect, validity, or enforceability of such contract, agreement or record shall not be denied—

1. on the ground that the contract, agreement or record is not in writing if the contract, agreement or record is an electronic record; and

2. on the ground that the contract, agreement, or record is not signed or is not affirmed by a signature if the contract, agreement, or record is signed or affirmed by an electronic signature.”

“With respect to any contract, agreement, or record entered into or provided in, or affecting, interstate commerce or foreign commerce—

(A) the parties to such contract, agreement, or record may establish procedures or requirements regarding the use and acceptance of electronic records and electronic signatures acceptable to such parties;

(B) the legal effect, validity, or enforceability of such contract, agreement, or record shall not be denied because of the type or method of electronic record or electronic signature selected by the parties in establishing such requirements; and

(C) nothing in this section requires any party to use or accept electronic records or electronic signatures.”

Although its scope is not as broad as H.R. 1714, S.761 takes a similar approach toward endorsing the validity of electronic signatures and electronic records. S. 761 provides:

“In any commercial transaction affecting interstate commerce, a contract may not be denied legal effect or enforceability solely because an electronic signature or electronic record was used in its formation.”
Uniformity: Affording insurers the benefits of uniformity across the various states is essential in helping to facilitate the use of electronic commerce in the insurance marketplace. While UETA and federal proposals only deal with signatures and records, they may provide a model for a uniform approach that can help bridge the variability in state insurance laws that can be a serious impediment to beneficial electronic commerce. The approach of not denying the effect of an action solely because all or part of it is accomplished using an electronic means can be extended to additional elements of the insurance process other than just signatures and records. Having done this, the regulator has the flexibility to decide that certain aspects of the process should be excluded from the general rule. The working group will study issues relating to electronic commerce as they arise to attempt to identify solutions that can apply in all states, and will also determine whether UETA and the federal legislation provide an appropriate framework for consideration of the issues raised in this paper.

To the extent appropriate and relevant, the working group will incorporate established definitions into its work and will defer to existing laws and regulations that have broad applicability to all industries.

Technology and Industry Neutrality: Electronic commerce can be employed using many technologies. New technologies are constantly emerging and existing technologies evolve rapidly. Most electronic technologies apply to a broad spectrum of industries. To the extent that one industry may be given greater flexibility in the use of technology over another industry, competitive advantages can be inadvertently granted. Accordingly, to the extent possible, making regulation of electronic commerce neutral so that it does not favor one industry or technology is a reasonable public policy objective.

UETA and the federal bills currently under consideration avoid favoring specific technologies and industries. For example, UETA avoids references to digital signatures (a specific security technology), in favor of a more general reference to the term “security procedure.” In doing this, UETA establishes certain criteria that must be met for a transaction to be considered secure, in lieu of giving precedence to a particular way of achieving the objective. Consistent with this approach, H.R. 1714 states:

“A statute, regulation, or other rule of law (including an insurance statute, regulation, or other rule of law) that modifies, limits, or supercedes section 101 shall not be effective to the extent that such statute, regulation, or rule:

(1) discriminates in favor of or against a specific technology, method, or technique of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures;
(2) discriminates in favor or against a specific type of size of entity engaged in the business of facilitating the use of electronic records or electronic signatures;
(3) is based on procedures and requirements that are not specific or that are not publicly available; or
(4) is otherwise inconsistent with the provisions of this title.”

In following this technology and industry neutral approach, the working group will strive to keep the insurance industry on a level playing field with other financial service industries while maintaining regulatory flexibility as the development and application of technologies evolve. Where specific guidance is needed to ensure consumer protections, the working group will recommend criteria or principles that need to be achieved to fulfill regulatory objectives and, to the extent possible, leave the selection of technology to be determined by agreement of the parties and market forces. Moreover, the working group will avoid favoring the use of a particular electronic media so that the choice of media (paper, electronic, or other) will not dictate the method of achieving efficacy of insurance transactions or
compliance with regulatory or legal requirements, unless there are specific reasons to require a particular media. The general goal will be to make insurance regulations and laws media neutral.

**Constraints to Beneficial Electronic Commerce**

**A. Signatures & Electronic Authentication**

**Definitions**

A “wet signature” (also known as a “manual signature”) is a handwritten signature or “mark” executed by a person, or on behalf of a person with that person’s knowledge and consent. The traditional “wet or manual” signature is used to signify several actions. It is used as a formal symbol of intent to denote an individual’s agreement to terms and conditions set forth in a document—“by my signature set forth below I hereby agree…”—or to acknowledge receipt of the item(s) in question. It is also used to convey that the signer is indeed who he/she purports to be (authentication).

An “electronic signature” is an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. Various security measures can be employed in connection with electronic signatures, including procedures to authenticate the identity of the sender of a message or of the signer of a document or to ensure that the original content of the message or document that has been conveyed is unchanged. Technology can also be used to ensure that electronic signatures are easily transportable, cannot be easily repudiated, cannot be imitated by someone else, and can be automatically time-stamped. Such security measures can be used with any kind of message, whether it is encrypted or not, so that the receiver can be sure of the sender’s identity and that the message has arrived intact, including the use of algorithms for the electronic coding and decoding of electronic transmissions using a process known as encryption and decryption. Digital signature technology, which employs the use of algorithms for the electronic coding and decoding of electronic transmissions using a process known as encryption and decryption, is one form of security measure, but other methods of achieving the same or similar objectives exist and more will develop over time.

The terms electronic and digital signatures tend to be used interchangeably but there are significant differences. An “electronic signature” may be any symbol or mark originated electronically with an intent to authenticate an action. A “digital signature” is a methodology of signing an electronic document to ensure its integrity during transmission utilizing “public key cryptography.” The individual sending the document signs and encrypts it with a private key that only the sender possesses. Once so encrypted, the resulting document is termed a “digital signature.” A recipient of the document uses a public key (which may be in the possession of multiple parties) to decrypt the document. Verification of the authenticity of the digital signature is facilitated when the signature includes a “digital certificate” issued by a “certification authority” or CA. The digital certificate is issued only after the identity of the signer seeking the certificate is verified by the CA, and, in this way, is analogous to the function performed by a notary public. The digital certificate carries the name of the subscriber and the subscriber’s private key.

Public key cryptography provides the foundation for network security through encryption and digital signatures. Together these provide the following capabilities: confidentiality (data is obscured and protected from view or access by unauthorized parties); access control (data can only be accessed and decrypted by those specifically identified when the data is encrypted); authentication (users can securely identify themselves to other users and servers on a network without sending secret information about
themselves); data integrity (the verifier of a digital signature can easily determine if the digitally signed data has been altered since it was signed); and non-repudiation (users who digitally sign data cannot successfully deny signing that data).

A “security procedure” as referenced in UETA is a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgement procedures.

An “electronic record” is a writing, document or other record created, stored, generated, received, or communicated by electronic means.

A “transaction” is an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

**Background**

Signatures provide several important functions, including an indication of consent between or among parties to be bound by or to accept or reject the provisions of an agreement, acknowledgement of receipt or delivery of an item, and the establishment of the identity of a person (e.g., the originator of a document).

Requirements that document be “signed” are found in all lines of insurance. Following is a partial list of the types of “in-writing” requirements that provides some examples of the types of signature requirements that now exist:

- With respect to life and health lines, insurers are generally prohibited from asserting that an applicant materially misrepresented facts unless the facts are contained in an application signed by the applicant and attached to the policy. This effectively requires all underwritten policies to be accompanied by a signed application.
- Some health insurance policies, including Medicare supplement insurance, may not be issued unless the applicant has signed the application. The purpose of the signature requirement is to protect consumers by evidencing they have read the materials accompanying the solicitation.
- Property and casualty forms evidencing coverage offers must be made in writing by the insurer and often accepted or rejected by the insured in writing. Such coverage includes, but is not limited to: uninsured/underinsured motorist; personal injury protection; medical payments; deductibles; tort thresholds; extended reporting periods on claims made coverages and fraud disclosure statements. The rejection in writing has been interpreted to require the applicant or insured’s signature.

The following list of documents are typically required to be accompanied by a “signature:”

- Policy application
- Warrants
- Release of confidential medical information
- License applications
- Beneficiary changes
- Uninsured motorist coverage

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- Earthquake offers
- Fraud prevention
- Life illustrations
- Claims forms
- Proof-of-loss
- Disclosures for consumer protection
- Change in coverage
- Life insurance insurable interest concerns

**Issues**

The ultimate question is whether electronic signatures can satisfy the objectives of physical signature requirements. Primary concerns raised about electronic signatures are with the security and verifiability of the signature. The security and verifiability of signatures provide both consumer protection and a mechanism to detect and control fraud. However, not all insurance transactions require the ultimate in security, and regulatory systems should not dictate levels of security that are beyond the need.

**Recommendations**

Before determining what constitutes a valid signature, a review of each requirement for signature should be undertaken to determine if the requirement is necessary for consumer protection. Where no substantive purpose for requiring a signature can be determined, elimination of the requirement should be considered as a first option.

In cases where a written signature, or other means of authentication, is necessary for consumer protection, the use of electronic means, with an appropriate security procedure to authenticate the identity of the party(ies) involved, shall be acceptable as long as:

- The means of electronic authentication is uniformly applied to the consumer; and
- The electronic authentication is unique to the signer, is verifiable, and neither the signature nor the document to which it is affixed can be altered once signed.

A review of authentication requirements in all insurance transactions should be conducted to identify and remove unnecessary inhibitors to electronic commerce. Electronic authentication should be permitted (but not required, except as the parties may agree) wherever “signatures” are required, including processes such as application and claim submittal. For example, when a consumer shops for private passenger automobile insurance, the consumer may be required by state law to submit a separate form to verify that he/she was offered such benefits as uninsured and underinsured motorist coverage, certain levels of deductibles, or a warning that insurance fraud is illegal. With electronic commerce, separate forms, each signed or authenticated by the consumer, may not be necessary or even feasible. If the consumer is shopping on a web site, the consumer should be permitted to view a page that discusses and offers uninsured/underinsured motorist coverage and warns that insurance fraud is illegal. To continue with the online application, the consumer would have to select a link at the bottom of the page and be asked to verify that he/she had read and understood the previous page or pages. This process, with some means of authentication that it was the consumer who indeed “clicked” the “OK” button, could take the place of separate forms, being authenticated by the consumer in a way very much like signing separate forms.
Note: The NAIC white paper entitled *The Marketing of Insurance Over the Internet* should be reviewed as a source for legal references and discussion of technology issues.

**B. Countersignature Requirements and other Non-resident Solicitation Restrictions**

**Background**

Some states require that a resident agent countersign policies issued by agents or insurers not domiciled in the state. Some states also have laws, regulations, or other requirements that specify that a non-resident producer must be accompanied by a resident producer to solicit insurance.

Countersignature requirements were originally intended to protect consumers under the assumption that the resident agent would be more knowledgeable about the state laws and would provide a valuable service to policyholders by reviewing the policy for compliance with state law. They were developed in a time when state jurisdiction was a primary concern.

**Issues**

Countersignatures impede the sale of insurance through traditional and electronic means. The question is whether these provisions are necessary for consumer protection.

It is generally agreed that this requirement has served its usefulness and now only serves as a protectionist of resident agents’ commissions. Similarly, while originally implemented to protect consumers, the utility of requiring the physical presence of a resident producer has passed and is now an impediment to efficient operation and specifically to electronic commerce.

**Recommendations**

Countersignature requirements should be eliminated. Similarly, any requirement for a resident producer to physically accompany a nonresident producer when visiting a potential policy holder is counter productive and should also be eliminated. These recommendations are made in recognition of the efforts of the Agent Licensing Models Working Group to streamline the non-resident producer licensing process. Any changes made to facilitate electronic commerce should be made in harmony with the agent licensing group’s efforts.

**C. Delivery, Format & Proof of Coverage**

**(i) Document Delivery**

**Background**

Most states require delivery of documents in physical form. This applies to transmissions between insurers and regulators as well as the transmissions of insurance policies, notices, and any other documents relating to the sale of insurance, by the insurer to the insured, owner, and other related parties.

Following is a list of some current document delivery requirements:
- Many states require insurers to deliver hard copy (paper) versions of documents, including policies, positional letters from claims, billing notices, cancellation/nonrenewal notices, certificates of insurance.
- Some proof of mailing requirements specify registered or certified mail from United States Postal Service or a verifiable courier service.
- Some states have proof of coverage laws that may be unique to different coverages.

**Issues**

In the arena of electronic commerce, many consumers will want policies and other insurance documents delivered electronically. Moreover, there are clearly advantages to electronic delivery for the consumer, mainly the speed with which the delivery can occur.

The major benefits of document delivery requirements are the ability of regulators to verify that the policy or other insurance documents involved in a sale of insurance from an insurer: (1) were actually delivered to the consumer in the sale transaction, (2) are maintained by the insurer in either electronic or paper format that is secure from tampering and facilitates audit and discovery, and (3) are available to the consumer within a reasonable time upon either electronic or written request by the consumer. Records retention systems will allow regulators to verify the content of a policy or other insurance document through inspection of the policy or document, and such systems must also reasonably accommodate requests from insureds for copies of their policies or insurance documents.

The delivery of various notices is required under state insurance law. A central issue is whether and when the notice has been delivered by the insurer and whether the notice has been received in a readable and retainable form by the policyholder or other party that is entitled to receive such notice.

UETA provides that unless the parties agree otherwise, an electronic record is “sent” when it: (1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated for purpose of receiving electronic records, (2) is in a form capable of being processed by that system, and (3) enters an information processing system outside the control of the sender.

Under UETA, unless the parties agree otherwise, a document is “received” when it: (1) enters an information processing system the recipient has designated for purpose of receiving electronic records, and (2) is in a form capable of being processed by that system. UETA provides that receipt of an electronic acknowledgement from the information processing system establishes that a record was received.

**Recommendations**

While the insurer must let the consumer know prior to the purchase of the policy how it will be delivered, laws and regulations need to allow for electronic delivery. Document delivery through electronic means should be permitted if agreed upon by the insurer and the applicant, policyholder, certificate-holder, or other parties involved in the transaction, but the burden is on the insurer to meet all existing requirements for policy delivery regardless of the method in which the policy or other insurance documents are actually delivered to the insured. In addition, any policy or other insurance document delivered to an insured during the insurance transaction must be maintained by the insurer in either electronic or paper form and the insurer must be able, in a reasonable time period, to provide and electronic or paper copy of the policy or other insurance document to the insured upon written or electronic request by the insured.
The working group recommends that states review and, if necessary, amend existing laws, regulations, and processes to recognize electronic notification as a valid way to notify a policyholder, provided that both parties agree to the method, and receipt of the notice by the insured is verified to the extent required by law, and that acceptable records are maintained. For purposes of delivery, and other communications required or permitted by a state and its attendant regulations, delivery and communication by electronic or other verifiable means shall not be precluded where agreed to by the parties.

Once again, it is preferable to specify the parameters for document delivery rather than trying to predict all of the ways in which policies may be delivered electronically in the future, or developing requirements for each method of delivery.

The working group will also review the parameters from UETA set out above in addressing issues regarding delivery and receipt of documents.

(ii) Format

Background

The format of documents refers to stylistic presentation requirements including font size, margins, paper color, and paper size. Such requirements are common in state law and grow out of the desire to ensure proper recognizable notice of coverage or non-coverage and easy readability by consumers.

Issues

Insurers are burdened by compliance with non-uniform requirements that relate to font size, paper color, or other requirements that are related to presentation on printed documents that may not be able to be met electronically. For example, some states have required workers compensation notices to be on non-standard sized paper and printed in red.

Each state has its own set of requirements for various insurance products and documents. It is an enormous task which imposes a substantial cost on insurers for compliance. These requirements are a significant impediment to electronic commerce due to the specific compliance requirements and the lack of uniformity across state lines.

Recommendations

Because of the wide variety of operations that users can perform upon displayed and printed text in the modern PC environment, it is impractical to hold originators responsible to insure that textual content is displayed or printed with a specific font size, or on a specific page size or color.

In the electronic commerce environment, specifying font size or intensity may be less important than in the paper-based marketplace since the recipient often receives documents on a different system than by which it was sent and the receiving machine may format the message into different font styles and intensity. However, the consumer may print the document as it exists or electronically alter the scale of the document to his or her particular situation, needs or preferences.

To eliminate barriers to the use of electronic commerce, the working group recommends that existing law should be modified to allow that specific requirements for font type and size for printed documents be satisfied for electronically transferred or displayed records by using a font with characters which are
clearly discernable and understandable to a person conversant in the written language presented, with as nearly as possible, in the given font, the same relative character sizes for different parts of the document as are specified by current law.

(iii) Proof of Coverage

Background

Proof of coverage refers to the ability to verify that specified coverage is in force for a given insured or risk. Some states specify the form and format of the proof-of-coverage. This is an essential consumer and anti-fraud protection that under current law is often validated through a physical method such as a signed document.

Issues

In many instances, particularly with automobile, homeowners, and health insurance, individuals are called upon to produce a paper document proving that they have a specific type of coverage in effect. This paper form can then, as an example, be used to verify automobile coverage to register the car or when stopped by a peace officer. These requirements can create a barrier to electronic transactions, as they require the use of paper documentation.

Recommendations

Paper evidence of proof of coverage may not be essential to the substantive purpose of these requirements and can readily be satisfied through electronic means such as a smart card, electronic records, etc. If the substantive policy of ensuring proof of coverage can be achieved through the use of non-paper records, the use of such records should be permitted.

(iv) Electronic Payments

Background and Definitions

Electronic payment includes, but is not limited to, any electronic means of securing payment such as, wire transfers, smart cards, phone cards, electronic fund transfers, electronic checks, credit cards, and debit cards.

Technology for electronic payments is changing rapidly as the efficiencies of reducing paper and transmittal time become increasingly important. The trend is for point of sale electronic payment through credit or debit cards. Where checks are still used it is possible they will not be passed through the system but will be returned to the writer at the point of sale. Imaging of checks and transmitting the image may have significant impact on the insurance process that traditionally has relied on payment by draft. Certain regulations require paper-oriented payment, especially in the claims process and in certain premium refund situations.

Issues

There are several types of insurance payments that appear in state laws, regulations or processes, each with a unique set of potential constraints. The issues surrounding the various types of payments are detailed below.
Premium payment: Currently, the principal statutory impediment to the use of electronic forms of premium payment involves payment by credit card. Requirements for insurers may vary with the line of insurance. Some state laws, regulations, or processes totally prohibit the use of a credit card for payment of life or property/casualty insurance premiums or allow those payments only if the card is issued by a bank that is domiciled in the state.

In some states, an insurer which offers a credit card payment option must offer additional payment options, such as advance payment by check or the “bill me” option. In addition, certain states require that, if payment by credit card is made available to some insureds, it must be made available to all insureds on a nondiscriminatory basis.

Claims Payment: Certain state statutes, which formerly required claims to be paid by check or draft, have expanded permitting forms of payment to include electronic funds transfer. Such statutes arguably prohibit newer forms of electronic payment, such as electronic checks, smart cards, and debit cards.

Settlement Refunds: Refunds directed by insurance commissioners almost always require insurers to issue a check to the insured rather than a credit to his/her premium account or bank account. The most recent example is a Michigan Insurance Department directive to insurers, which stated that crediting an insured’s premium account rather than issuing a check was in violation of the spirit and intent of the mandated refund in the state.

Recommendations

For electronic commerce to be as effective as possible within the insurance industry, the use of various electronic means to make payment must be allowed. These can include credit cards, debit cards, electronic funds transfer (EFT) or other means of electronic payment. Such methods should be acceptable to both the insurer and the insured and be verifiable. Insurance consumers will demand that electronic payments be facilitated when using electronic systems to purchase and receive insurance products. To this end, regulators should eliminate prohibitions or restrictions against electronic payments to the fullest extent possible.

The working group received comment that some insurers may be reluctant to accept premium payment by credit card because there are limitations on how merchants pass fees paid to the credit card company back to the credit card users. Any restrictions on pass through of credit card fees may be governed by credit card association rules or banking laws and regulations. Insurance regulators may wish to review the interaction of rules of credit cards association and banking and insurance regulations in their states as they review various forms of electronic payment for premiums.

(v) Records Retention

Background

The phrase “records retention” encompasses the requirements for length of retention and method/form for storing company records. Records retention laws, which require insurers to maintain hard copy (paper) documents for a period of years, are found in many states.
Requirements for physical record retention have forced insurers to create expensive and cumbersome record keeping and extraction systems, which could be replaced with more efficient, effective electronically facilitated systems. The substantive reasons for requiring physical form are equally achievable through appropriate security procedures that can detect tampering and ensure appropriate safeguarding of the records through electronic data backup procedures.

**Recommendations**

Rather than attempting to specify technical requirements for electronic records retention systems, which will continue to evolve rapidly, regulators should clearly enunciate the objectives and basis for records retention requirements and place the burden solely on the insurer to meet those purposes with whatever system or technology is chosen. Following is sample language taken from the NAIC Market Conduct Record Retention Model Regulation which would implement this approach:

“Records required to be retained…may be maintained in paper, photograph, microprocess, magnetic, mechanical or electronic media, or by any process which accurately reproduces or forms a durable medium for the reproduction of a record. A company shall be in compliance with this section if it can produce the data which was contained on the original document. In cases where there is no paper document, a company shall be in compliance if it can produce information or data which accurately represents a record of communications between the insured and the company or accurately reflects a transaction or event.”

Note: The Freedom of Information Law (FOIL) should be reviewed for further information.

**(vi) Disclosures and Disclaimers**

**Background**

Disclosure of license status refers to a means of readily identifying whether an insurer or producer is authorized to transact insurance in a particular location for the insurance products being considered. Disclaimers attempt to make it expedient for insurers to inform consumers that a product is not available in a given state.

**Issues**

Some states currently have disclosure standards that contain stylistic requirements such as font size or other characteristics such as the use of strong, bold or emphasis tags, or the use of specific heading levels. Such requirements have limited applicability, and may create a barrier to disclosures provided electronically.

There may be different methods to provide disclaimers on web sites. For example, a general statement may appear on the web site listing the states in which a particular product may or may not be sold. Alternatively, a web site may be developed to provide an electronic message when a consumer attempts to access information about a particular product stating that such insurer is not licensed to do business in the consumer’s state or that the particular product is not available in the consumer’s state.

**Recommendations**
Existing standards that apply to this type of consumer notification should apply to electronic transactions; however, to the extent possible, additional standards should not be imposed on electronic or Internet-based transactions that do not exist for other means of delivery.

Disclosure standards should, at a minimum, continue to require disclosures to be prominently displayed and easily readable. Disclosure standards should not contain stylistic requirements that could cause impediments to electronic commerce.

The working group recommends that use of disclaimers regarding licensure status or the availability of a product in a particular state through electronic means be allowed.

The working group will continue to study this issue in the context of the type of licensure information and other disclosures and disclaimers that should be included on insurer or producer web sites for consumer awareness and confidence.

Note: The Suitability Working Group is also studying this issue. Any changes made to this area should be consistent with the goal of the suitability group.

(vii) Advertising

Background

Advertising involves many approaches and media to portray a message to the public or to targeted segments of customers, or other audiences. The purposes of advertising can be many, including increasing sales of products or services, maintaining stability or forestalling the loss of existing clientele, establishing or re-establishing a public image, educating the public regarding certain safety measures, providing public service announcements, and achieving public policy aims, to name a few.

There are many different definitions of advertising in state law, and, depending on the regulatory context, multiple applications of the same definition. For example, the Life and Annuities Model Regulation proffers this definition:

“Advertisement” means material designed to create public interest in life insurance and annuities or in an insurer, or in an insurance producer, or to induce the public to purchase, increase, modify, reinstate, borrow on, surrender, replace or retain a policy including:

(a) Printed and published material, audiovisual material and descriptive literature of an insurer, or insurance producer used in direct mail, newspapers, magazines, radio and television scripts, billboards and similar displays, and the Internet or any other mass communications media;

(b) Descriptive literature and sales aids of all kinds, authored by the insurer, its insurance producers, or third parties, issued, distributed, or used by the insurer or insurance producer; including but not limited to circulars, leaflets, web pages, depictions, illustrations and form letters;

(c) Material used for the recruitment, training and education of an insurer’s producers which is designed to be used or is used to induce the public to purchase, increase, modify, reinstate, borrow on, surrender or retain a policy;
(d) Prepared sales talks, presentations and materials for use by insurance producers.

“Advertisement” for purposes of this regulation shall not include:

(a) Communications or materials used within an insurer’s own organization and not intended for dissemination to the public;

(b) Communications with policyholders other than material urging policyholders to purchase, increase, modify, reinstate, or retain a policy;

(c) A general announcement from a group or blanket policyholder to eligible individuals on an employment or membership list that a policy or program has been written or arranged; provided the announcement clearly indicates that it is preliminary to the issuance of a booklet explaining the proposed coverage.”

As can be seen, the definition focuses mainly on the advertisement of certain products because the context is the regulation of the methods of sale of annuity and life products. But similarly unique regulatory applications for the sale of property and casualty, health, and mortgage guaranty insurance may exist.

**Issues**

The regulation of advertising is a difficult responsibility. The many challenges associated with the regulation of advertising include the determination of the degree of regulation without stifling the marketplace. The Internet complicates this issue because an individual can access an insurer or producer web site from any location. This feature makes requirements for filing and prior approval of advertising material difficult or impossible for insurers to meet. Further, the fact that an insurer, producer, or other person maintains a web site, or other electronic presence, does not in and of itself, necessarily mean that such insurer, producer, or person is “advertising” insurance products or transacting the business of insurance within a state. Similar concerns exist with national media advertisements.

**Recommendations**

The working group recommends that states consider whether requirements for filing and prior approval of advertising should be eliminated as an inefficient use of scarce regulatory resources. The working group believes that retrospective review of advertising through market conduct examination or other state regulatory review processes may adequately protect consumer’s interest. Further, Unfair Trade Practices Acts may provide sufficient relief for consumers regardless of the medium used. If a state decides that it wishes to retain prior review of advertising materials, the working group recommends that it use the NAIC’s SERFF system for its efficient electronic filing and review capabilities.

The working group will continue to study this issue and attempt to develop recommendations for appropriate uniform regulation of electronic advertisement.

Note: the progress of the NAIC Suitability Working Group should be monitored for further information on this issue.
(viii) Jurisdiction

Background

The Internet knows no bounds. A person in one state can easily access the web sites of insurers domiciled in other states. Regulators are attempting to address the circumstances under which the maintenance of a web site can expose a business or individual to a state’s jurisdiction or regulatory oversight. The case law on these issues is still developing.

Issues

The main issue to be considered is under what circumstances it is appropriate for an insurance regulator to exercise jurisdiction over an insurance company or agent or other related entity that maintains a web site that is merely accessible by a person residing in that regulator’s state.

Recommendations

The working group will continue to monitor the developments in this area as technology and the use of the Internet continues to advance. The working group believes that the mere maintenance of a web site, where the web site owner has done nothing to purposely avail himself of the benefits of doing business in that jurisdiction shall not alone constitute “doing business” in a state for purposes of the insurance regulator’s ability to exercise jurisdiction over the existence, contents, or format of the web site.

Near Term Priorities and Future Initiatives:

The working group will continue to study issues with regard to electronic commerce with the following priorities for the near term:

1. Signatures: The working group will study the various proposals regarding electronic signatures including UETA and the federal legislation. The working group will also study how the provisions in the various electronic signature proposals apply to specific state insurance law provisions.

2. Advertising: The working group will continue to study advertising issues and develop further recommendations.

3. Formats: Various formatting issues exist across the spectrum of products and they are manifested differently in the life, health, and property and casualty environments. The working group will continue to work to address issues and seek global, effective, technology neutral solutions.

4. Filings: The working group will work within the context of other NAIC initiatives to further facilitate electronic form filings.

Additional issues discussed in this paper will be put on the agenda of the working group, and additional recommendations may be developed as the work of the group progress.
In addition, the working group will develop a process by which impediments to electronic commerce can be identified and nominated for priority consideration by the working group so that the working group can be responsive to emerging trends and to positively effect change.

Harmony and consistency across state lines are essential to successfully facilitating beneficial electronic commerce in the industry. Accordingly, collaboration with the National Conference of Insurance Legislators, the National Conference of State Legislators, and other governmental associations and entities will be explored.