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Avoid Pitfalls in Electronic Delivery of Documents with an E-SIGN Compliance Strategy

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Federal and state laws impose requirements for delivering documents electronically to consumers, including with respect to insurers, agents, and brokers. The federal Electronic Records and Signatures in Commerce Act (commonly referred to as “E-SIGN”) requires a consumer’s informed, affirmative consent to receive the documents electronically. But states may “reverse-preempt” E-SIGN by adopting the Uniform Electronic Transactions Act (UETA), loosening the minimum legal requirements for electronic delivery.



The consent and disclosure requirements that apply therefore may vary among three camps: (1) the majority of states that have adopted the UETA and do not require the consumer consent and disclosures that E-SIGN requires; (2) approximately 15 states that have adopted the UETA but keep the federal consumer consent and disclosure requirements; and (3) three states—New York, Illinois, and Washington—that have not adopted the UETA.

Therefore, as discussed more fully below, one compliance strategy for delivering documents to consumers electronically across multiple jurisdictions would be to comply with E-SIGN as establishing a minimum set of national standards for effective delivery of documents.

Federal Consent and Disclosure Requirements

In 2000, Congress passed E-SIGN to “facilitate the use of electronic records and signatures in interstate or foreign commerce.”[1] [①](#) E-SIGN was adopted, in part, in response to state variations

in the form of UETA, especially in California and Iowa. The aim of the bill was to bring consistency and uniformity to the requirements for conducting electronic transactions that are legally effective, valid, and enforceable. E-SIGN states that in any transaction in or affecting interstate or foreign commerce, a contract may not be denied legal effect, validity, or enforceability solely because an electronic signature or record was used in the contract's formation.[2] ②

E-SIGN applies expressly, though not exclusively, to insurance.[3] ③ Insurance agents and brokers are excepted from liability under E-SIGN to the extent the agent or broker (1) did not engage in negligent, reckless, or intentional tortious conduct; (2) was not involved in the development or establishment of the electronic procedures; and (3) did not deviate from such procedures. [4] ④

[Section 7001](#) of E-SIGN sets forth the requirements for ensuring that an electronically delivered document is legally effective, valid, and enforceable. One such requirement is that the consumer provide affirmative consent to receive the documents electronically.[5] ⑤ The customer may withdraw such consent at any time.

In addition, before providing consent to electronic delivery, the consumer must be provided a “clear and conspicuous” statement that informs the consumer of the following:

- the right to a paper copy and to withdraw consent to electronic delivery, including any conditions, consequences, or fees of such withdrawal of consent;
- whether the consumer's consent applies only to the transaction or to certain categories of records;
- the requisite procedures for withdrawing consent and for updating contact information; and
- how to obtain a paper copy, including whether any fee will apply (although, beware that certain states prohibit such fees).

The consumer also must be provided a statement of the hardware and software requirements to access and retain the electronic documents.

Consent must be provided electronically in a manner that “reasonably demonstrates that the consumer can access” information in the electronic form that will be used to deliver the

documents.[6] ⑥ However, the legal effectiveness, validity, or enforceability of the contract may not be denied solely for failure to obtain consent in such a manner.[7] ⑦

States May Reverse-Preempt Federal Requirements

[Section 7002](#) of E-SIGN expressly allows states to reverse-preempt the requirements set forth in [Section 7001](#), provided that the state law meet certain conditions. The state law must either

- adopt the UETA, as discussed more fully below, and not deviate in a way that would be inconsistent with E-SIGN; or
- set forth alternative requirements that are consistent with E-SIGN, do not require or accord greater legal status to a specific technology, and specifically refer to E-SIGN.

A state that has passed a law satisfying either of the above requirements may be considered to have reverse-preempted the requirements set forth in [Section 7001](#), including with respect to consent and disclosures.

While questions exist as to whether and to what extent specific state laws properly satisfy the above requirements (e.g., what it means to be “consistent with” E-SIGN), such issues are beyond the scope of this article. In addition, E-SIGN’s preemption provisions are complex and have not been tested extensively in the courts. Nevertheless, a common view is that E-SIGN establishes a minimum set of national standards for effective delivery of documents.[8] ⑧

States Vary Regarding Consent and Disclosure Requirements

Prior to E-SIGN, in 1999, the Uniform Law Commissioners rafted the UETA as a model law to establish the legal equivalence of electronic records and signatures with paper writings and ink signatures to remove barriers to electronic commerce. All states except New York, Illinois, and Washington have adopted some form of the UETA. Most of the states that have adopted the UETA reverse-preempt [Section 7001\(c\)](#) of E-SIGN regarding consumer consent and disclosures. Approximately 15 of the UETA states, however, have kept such portion of the federal requirements.[9] ⑨

It is worth noting that federal and state electronic delivery requirements sometimes will not apply to certain types of documents, such as notices of cancellation or termination of health or life

insurance benefits (excluding annuities).[10] ⑩

Consent. E-SIGN and the UETA differ with respect to the type of consent that insurers and brokers must obtain from the consumer. While E-SIGN requires affirmative consent, the UETA requires only that if the parties “have agreed” to conduct a transaction by electronic means, the electronic record must be “capable of retention” by the recipient at the time of receipt.[11] ⑪

In addition, under the UETA, the effect of an electronic record or electronic signature is determined “from the context and surrounding circumstances” at the time of the document’s creation, execution, or adoption.[12] ⑫ Therefore, such UETA provisions might not require a consumer’s affirmative consent.

Insurers, agents, and brokers should be aware that certain states’ insurance codes also may impose more stringent requirements, including affirmative consent, for certain types of insurance. In California, for instance, insurers, agents, and brokers must obtain affirmative consent, confirmed in writing, before conducting an electronic transaction in insurance.[13] ⑬ Such heightened standards increase the potential pitfalls for delivering electronic documents in insurance transactions and make compliance with E-SIGN a safer compliance strategy for insurers, agents, and brokers.

Disclosures. E-SIGN also differs from the UETA with respect to how consent must be obtained from consumers. The UETA does not contain any requirement to provide certain disclosures to consumers before or after obtaining consent to conduct the electronic transaction. Therefore, it may be unclear to insurers and brokers what, if any, disclosures they must provide to properly obtain consent from consumers to conduct the insurance transaction electronically.

In addition, as previously discussed, states also may have passed specific provisions in their insurance code that impose stricter requirements for insurance transactions.[14] ⑭

Compliance May Be the Simplest and Safest Strategy

Consent and disclosure requirements for conducting a legally effective, valid, and enforceable electronic transaction vary among states that do not adopt the UETA, states that adopt the UETA but keep portions of the federal requirements, and states that adopt the UETA and reverse-preempt the federal requirements. Therefore, it often may be unclear which consent and

disclosure requirements apply.

To avoid regulatory exposure, insurers, agents, and brokers can follow the federal requirements set forth in E-SIGN for obtaining a consumer's consent to conduct a transaction in insurance electronically. E-SIGN allows states to "reverse-preempt" the federal requirements to the extent the state law is not inconsistent with E-SIGN. Therefore, E-SIGN is commonly viewed as setting the maximum legal requirements that a state can impose on electronic disclosures without becoming inconsistent with E-SIGN and hence preempted. Compliance with E-SIGN is a strategy to ensure compliance with any state law concerning electronic delivery of documents.

An E-SIGN compliance strategy should include obtaining a consumer's affirmative consent, either by having the consumer check a box (that has not been prechecked) or by other acceptable form of electronic signature. And the consumer should be provided the proper disclosures before and after providing consent, as detailed in [Section 7001\(c\)](#) of E-SIGN. By following such procedures, insurers and brokers can greatly reduce the risk of investigation or action by any state insurance regulator concerning their electronic delivery practices, and they may safely assume that the electronic delivery is legally effective.

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End Notes



1. [15 U.S.C. § 7001](#) et seq.
2. [15 U.S.C. § 7001\(a\)](#).
3. [15 U.S.C. § 7001\(i\)](#).
4. [15 U.S.C. § 7001\(j\)](#).

5. [15 U.S.C. § 7001\(c\)\(1\)](#).
6. [15 U.S.C. § 7001\(c\)\(1\)\(C\)\(ii\)](#).
7. [15 U.S.C. § 7001\(c\)\(3\)](#).
8. See [Progressive Advanced Ins. Co. v. Corekin](#), at *3 (D. Md. Sept. 18, 2017) (holding that Maryland UETA not preempted by E-SIGN because specific additional requirements were “consistent” with E-SIGN).
9. See [Mass. Gen. L. ch. 110G, § 3](#); [N.J. Rev. Stat. § 46:26C-2](#). See also [Naldi v. Grunberg](#), 908 N.Y.S.2d 639, 646 (N.Y. App. Div. 2010) (“New York’s lawmakers appear to have chosen to incorporate the substantive terms of E-SIGN into New York state law.”).
10. See [15 U.S.C. § 7003\(b\)\(2\)\(C\)](#); [Ala. Code tit. 8, § 8-1A-3\(c\)\(2\)\(c\)](#).
11. UETA § 8(a).
12. UETA § 9(b).
13. See [Cal. Ins. Code § 38.6\(b\)](#). Whether [section 38.6](#) may be preempted by E-SIGN is an important question that is beyond the scope of this article.
14. See [Cal. Ins. Code § 38.6\(b\)](#).