

PROCEDURE FOR ELECTRONIC DELIVERY OF INSURANCE DOCUMENTS PURSUANT TO THE FEDERAL eSIGN ACT

Updated May 14, 2021

This memorandum is not intended to provide specific advice about individual legal, business, or other questions. It was prepared solely as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

As technology becomes more ingrained in our personal and professional lives, it is important for agents and brokers to have the tools necessary to meet consumers’ digital habits. One area of particular importance is consumers’ growing willingness to receive documents electronically. When implemented correctly, electronic delivery can save time and money while meeting consumer preferences and reducing legal exposures.

The federal Electronic Signatures in Global and National Commerce Act (“eSIGN Act”) and a variety of state laws and regulations govern electronic delivery of documents and related issues. Generally speaking, the eSIGN Act and related state laws permit the electronic delivery of documents that must be provided to consumers in writing, including certain policies, notices, and endorsements, when the agency provides the required disclosures and the consumer consents to the electronic delivery. Certain documents may not be provided solely via electronic delivery; most pertinent for the insurance industry are documents for termination of health insurance or benefits of life insurance (excluding annuities).

For electronic delivery to be valid, a consumer must affirmatively consent to the electronic delivery and must not have withdrawn that consent, after the consumer has been provided a clear and conspicuous statement advising the consumer of at least the following information:

1. The right or option for the consumer to receive documents in paper form;
2. The right to withdraw the consent to electronic delivery and any conditions, consequences, or fees associated with such withdrawal;
3. A description of the procedures that the consumer must follow to withdraw the consent to electronic delivery and to update information needed to contact the consumer electronically;
4. A description of how the consumer, after consenting to electronic delivery, may obtain a paper copy of any record and whether any fee will be charged for such a copy;
5. A statement regarding whether the consent applies only to a particular transaction or category of documents;
6. A description of the hardware and software requirements for access to and retention of documents delivered electronically.

The eSIGN Act also requires an agency to inform consumers who have consented to electronic delivery regarding: (i) any change in the hardware and software requirements necessary to access or retain records if that change creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent; and (ii) the right to withdraw consent without the imposition of any fees for the withdrawal and without the imposition of any condition or consequences that have not already been disclosed to the consumer.

The requirements for electronic delivery to businesses and to individuals whose transactions are not primarily for personal, family, or household purposes may be less stringent. Agencies should review the applicable state laws and regulations, and consult with an attorney as needed. Relatedly, although the eSIGN Act does not require a specific form of electronic delivery, agencies are encouraged to use an electronic delivery method, such as a portal, that ensures secure delivery of all documents and compliance by all agency staff.

The Big “I” Office of General Counsel and the Agents Council for Technology are pleased to make available to members a sample consent form, which is attached as Exhibit A. The sample consent form is written to meet the requirements of the eSIGN Act. Additionally, the sample consent form contains other information that is advisable to disclose to consumers – and in some cases, may be required by state laws or regulations. For example, it is advisable for the agency to send the consent form and require the consumer to return the form by the same means that the agency will send other electronic documents. This ensures that the consumer has the required hardware and software to receive and review documents electronically.

It is our hope that agencies will find this memorandum and the sample consent form to be useful tools when implementing electronic delivery or reviewing an existing electronic delivery program. However, two important points are in order. First, the sample consent form is written to meet the requirements of the eSIGN Act and does not necessarily comply with all state laws and regulations. Although the eSIGN Act and analogous state laws and regulations typically overlap, the sample consent form may need additional information to ensure compliance with applicable state laws and regulations. Therefore, agencies should review the applicable state laws and regulations – and consult with an attorney as needed – to ensure that their consent form is in full legal compliance. Second, agencies should review their policies and practices to ensure consistency with the terms of their electronic delivery consent form. In some cases, this review may show the need for changes to meet legal requirements; in other cases, the agency will have the discretion to decide whether to change its policies or practices, or whether to change its electronic delivery consent form. At any rate, agencies must operate in conformity with the statements in their consent form. Agencies should also keep this advice in mind when they make changes to their electronic delivery policies and practices, including changes to the method of delivering documents. If an agency does not operate in conformity with its consent form, the agency may face unwanted investigations by the Federal Trade Commission and state authorities.

Any questions regarding this memorandum or the sample consent form should be directed to Scott Kneeland or Eric Lipton.

**EXHIBIT A (Sample Consent Form)**

IMPORTANT DISCLAIMER. THIS MUST BE READ BEFORE YOU USING THE SAMPLE FORM.

This Sample Form for Disclosure and Consent to Receive Records Electronically (“Sample Form”) has been prepared for IIABA member agencies to use as a template when preparing their own eDelivery consent form for their clients. This Sample Form is offered to assist agencies that distribute documents electronically to clients, as well as those agencies that wish to do so, in meeting the requirements of the federal Electronic Signatures in Global and National Commerce Act and analogous state laws. This Consent Form should be distributed in the same manner that the agency will distribute the documents that are subject to this Form, and the client’s response to the agency should be transmitted in the same manner. The purpose is to ensure that the client can access the documents properly before the client agrees to electronic delivery.

By providing this Sample Form to member agencies, IIABA does not intend to provide, and is not providing, a legal opinion or legal advice. The states where your agency conducts business and the carriers with which your agency transacts business may have legal, regulatory, contractual, or other requirements that provide for additional or different disclosures. Moreover, this Sample Form includes only general information and comments, and is not intended to provide specific advice about individual legal, business, or other questions. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

**SAMPLE CONSENT FORM**

YOU MUST READ THE FOREGOING DISCLAIMER BEFORE USING THIS FORM

**Introduction.** By clicking the “I Agree To Electronic Delivery” button below, you are providing consent to [name of agency] (“Agency”) to provide documents to you electronically on behalf of the agency, the insurance companies represented by the agency, and other third parties. All documents sent by Agency to you are subject to this Consent Form, including but not limited to, any and all disclosures, declarations, contracts, policy forms, certificates, and/or documents, information, requests, applications, communications, and/or notices required by federal law, except when applicable law requires notice by another means. You agree that electronic delivery of documents is sufficient to meet all reporting and/or notice requirements, except when applicable law requires notice by another means. You are not required to receive documents electronically. If you do not agree to this Consent Form, please click the “I Do Not Agree To Electronic Delivery” button below, and Agency will provide documents in accordance with applicable law.

Your agreement to accept documents electronically means that once Agency delivers a document to you, and if required, you click to accept the document, the terms contained in the document apply to you. Additionally, it means that Agency may not mail you copies of documents that are provided electronically. You must print or otherwise retain a copy of this consent form for your records.

**Electronic delivery of documents.** When Agency delivers a document electronically, it will do so by making the document available to you through an online customer portal where documents are placed for you to view or by sending the document by e-mail. You should check your e-mail periodically to ensure timely receipt of any document delivered electronically. You agree to access the portal within 10 days of receiving notification that a document has been posted. A document will be considered delivered to you when: (1) the e-mailed document leaves Agency’s system (if e-mailed); or (2) the document is posted on the portal. To be clear, a document is not considered delivered based on when you review the document.

The receipt of documents electronically has security and privacy risks. E-mail and online security and privacy cannot be guaranteed, and e-mails can be intercepted without your permission. If you agree to this Consent Form, you acknowledge and agree to accept these and other risks of receiving documents electronically.

**Hardware and software requirements.** Before agreeing to receive documents electronically, you must determine whether you have the necessary hardware and software to access and retain documents electronically. To access documents, you will need an e-mail address, Adobe Acrobat Reader, and a personal computer or other personal device that is capable of accessing the internet. To retain documents, your access device must have the ability to download to your hard drive, or an external media storage device, or to print the documents, as well as embedded HTML files. If you are unable to access a document electronically, you are obligated to notify Agency immediately by phone at [agency’s phone number] or by e-mail to [agency’s e-mail address].

If, after you have consented to the terms and conditions of this Consent Form, a change in the hardware or software requirements needed to access or retain documents electronically creates a material risk that you will not be able to access or retain subsequent documents delivered electronically, upon request, Agency will provide you with a statement of the revised hardware and software requirements for access to, and retention of, the documents, and the right to withdraw your consent without imposition of any fees for such withdrawal, and without imposition of any condition or consequence that was not disclosed in this Consent Form.

**Delivery and receipt of documents in paper form.** You have the option to request that Agency provide you with paper copies of the documents Agency provides to you electronically. If you wish to obtain a paper copy of a document, you may send an e-mail request to [agency’s e-mail address] or a written request to [agency’s physical address]. You will not be charged for paper copies of a document.

Moreover, even if you consent to receive documents electronically, Agency may choose, in its sole discretion, to send paper copies of documents to you even though the documents were made or could have been made available to you electronically. Such delivery will be provided to you at the most current mailing address on file.

**Right to withdraw consent and procedures for withdrawal.** You may withdraw your consent to receive documents electronically, at any time and without charge, by sending an e-mail request to [agency’s e-mail address] or a written request to [agency’s physical address]. Withdrawal of your consent shall not affect the legal effectiveness, validity, and/or enforceability of documents provided or made available to you electronically prior to implementation of your withdrawal of consent. Your withdrawal of consent shall be effective within ten (10) days after receipt by Agency of your withdrawal request. Thereafter, such delivery will be provided to you at the most current mailing address on file.

**Authority to access to documents delivered electronically.** You are the only individual authorized to access your documents from Agency electronically. You shall not share or disclose your password or other secure method to access documents delivered electronically. You shall take all reasonable measures to protect your access devices to prevent unauthorized access to documents delivered electronically.

**Prompt notification of changes.** You agree to notify Agency promptly of any changes to your mailing address, e-mail address, or other information. Notification may be by e-mail to [agency’s e-mail address], in writing to [agency’s physical address], or by telephone at [agency’s telephone number]. You agree to hold harmless Agency in connection with your failure to provide current and valid contact information.

By clicking the “I Agree To Electronic Delivery” button below, you confirm that you have read and understood this Consent Form in its entirety, that you consent to the electronic delivery of documents by Agency on its behalf and on behalf of insurers and other third parties, that your hardware and software systems meet the requirements set forth herein, that you are able to access and retain documents presented to you on a portal or via e-mail, and that you have printed or stored

a copy of this Consent Form. If you do not agree to the terms of this Consent Form, please click the “I Do Not Agree To Electronic Delivery” button below.