California Department of Insurance
Report on the Impact and Implementation of the Authorization to Transmit Specified Documents Electronically Pursuant to AB 2591 (Chapter 617, Statutes of 2016)

On September 25, 2016, Assembly Bill 2591 was signed into law by Governor Edmund G. Brown Jr. AB 2591 revised and consolidated several standards applicable to the electronic transmission of specified property and casualty insurance and life insurance documents into a single, universal set of rules. In addition, this bill required the Commissioner to submit a report regarding the electronic transmission of property and casualty insurance and life insurance by January 1, 2019.

A. Background.

Civil Code § 1633.1 et. seq. permits people and entities in California to engage in electronic transactions and to sign documents electronically. Civil Code § 1633.3 exempts certain types of transactions from the permission granted by Civil Code § 1633.1, et. seq., meaning these types of transactions must be accomplished using paper and ink signatures.[i]

Insurance Code § 38.6 applies when a person or entity licensed under the Insurance Code wants to transmit any required written record electronically. Insurance Code § 38.6 allows insurers[1] to transmit almost all insurance documents electronically, including renewal offers, notices, and disclosures, provided the insurer obtains the consent of the consumer before sending the documents electronically, as long as the electronic transmission is not prohibited by Civil Code 1633.3 (b) and (c). Insurance Code § 38.6 sets forth requirements for the consumer's "opt-in consent disclosure" agreement.

Insurance Code § 38.6(d)(1) and (2) require the Commissioner to report to the California Legislature on or before January 1, 2019.

> (1) On or before January 1, 2019, the commissioner shall submit a report to the Governor and to the committees of the Senate and Assembly having jurisdiction over insurance and the judiciary, regarding the impact and implementation of the authorization of the electronic transmission of certain insurance renewal offers, notices, or disclosures, relating to the business of life insurance, as authorized by this section. The report shall include input from insurers, consumers, and consumer organizations, and shall include an assessment of the department's experience pertaining to the authorization of the electronic transmission of insurance renewals, relating to the business of life insurance, as authorized by this section.
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> (2) On or before January 1, 2019, the commissioner shall submit a report to the Governor and to the committees of the Senate and Assembly having jurisdiction over insurance and the judiciary, regarding the impact and implementation of the authorization of the electronic transmission of certain insurance renewal offers, notices, or disclosures including an offer of renewal required by Sections 663 and 678, the notice of conditional

[1] Section 38.6 applies to all licensees under the Insurance Code, including agents and brokers as well as insurers. For ease of reference, licensees are referred to as "insurers" in this report.

renewal required by Section 678.1, the offer of coverage or renewal or any disclosure required by Section 10086, and the offer of renewal for a workers' compensation policy, as authorized by this section. The report shall include input from insurers, consumers, and consumer organizations, and shall include an assessment of the department's experience pertaining to the authorization of the electronic transmission of insurance renewals, including an offer of renewal required by Sections 663 and 678, the notice of conditional renewal required by Section 678.1, the offer of coverage or renewal or any disclosure required by Section 10086, and the offer of renewal for a workers' compensation policy, as authorized by this section.
(Insurance Code § 38.6(d)(1) and (2).)

The statute requires the Commissioner to report on the impact and implementation of the authorization of the electronic transmission of certain insurance renewal offers, notices, or disclosures regarding:

- life insurance (Insurance Code § 38.6(d)(1)),
- auto insurance offer of renewal (Insurance Code § 38.6(d)(2), Insurance Code § 663),
- property insurance offer of renewal (Insurance Code § 38.6(d)(2), Insurance Code § 678),
- commercial insurance - notice of conditional renewal. (Insurance Code § 38.6(d)(2), Insurance Code § 678.1)[ii],
- offer of coverage or renewal or any disclosure required in Insurance Code § 10086 for earthquake (Insurance Code § 38.6(d)(2)),
- workers' compensation - offers of renewal (Insurance Code § 38.6(d)(2)).

B. Department of Insurance - Impact and Implementation of Insurance Code § 38.6.

1. Life Insurance.

The opt-in consent disclosure may be set forth in an application or other document that becomes part of a policy approved by the Commissioner. The Policy Approval Bureau (PAB) in the Department of Insurance (Department) reviews non-health disability, life insurance policies, and annuity contracts that are subject to prior approval. As part of this responsibility, PAB has reviewed, disapproved, and approved numerous opt-in forms submitted by insurance companies for use with their life insurance products (life insurance policies and annuity contracts).

Regarding the impact and implementation of Insurance Code § 38.6 as it applies to life insurance policies and annuity contracts that are required to be filed and approved, it has been PAB's experience that almost uniformly the opt-in forms when initially filed with the Department are not compliant.

Several examples of errors commonly found in opt-in forms are:

a) Failure to clearly state that the consumer's decision to receive documents electronically is voluntary. Insurance Code § 38.6(b)(2)(A).
b) Failure to state that the consumer may opt out from receiving documents electronically at any time, or failure to state the process for opting out. Insurance Code § 38.6(b)(2)(B).
c) Failure to adequately describe the documents that will be sent electronically. Insurance Code § 38.6(b)(2)(C).

d) Failure to state the “process or system” for the person to report a change or correction in their e-mail address. Insurance Code § 38.6(b)(2)(D).
e) Failure to place the consumer’s signature line/opt-in button/consent button immediately below the opt-in consent disclosure. Insurance Code § 38.6(b)(3).
f) Failure to include a place for the consumer’s e-mail address on the form. Insurance Code § 38.6(b)(4).
g) Failure to include language saying that the consumer is entitled to one free printed copy of any record upon request. Insurance Code § 38.6(b)(5).
h) Inclusion of language that automatically invalidates the consumer’s consent if the insurer is unable to transmit to the consumer’s e-mail address. If an electronic transmission is not received, the insurer must attempt delivery as set forth in Insurance Code § 38.6(b)(10)(A).
i) Inclusion of language that requires the consumer to agree to other additional things, or to waive certain rights, in order to receive documents electronically. For example, the opt-in agreement cannot require the consumer to hold the insurer harmless, agree to a certain jurisdiction for disputes, or waive warranties. The opt-in cannot require the consumer to pay a fee to receive documents on paper, or grant a discount for agreeing to electronic transmission. Insurance Code § 38.6(b)(11).

PAB believes that the prior approval requirement for opt-in consent disclosure forms in Insurance Code § 38.6(b)(3) has been beneficial for California’s consumers because it gives them the option to decide how they wish to receive their life insurance policies. In addition, consumers have the benefit of the required statutory disclosure.

The prior approval requirement is also valuable to insurers. It levels the playing field for insurers because it requires PAB to review forms and apply the same standards to all opt-in forms filed with PAB for use in California. Because of this, PAB believes that no insurer can obtain an unfair advantage over its competitors by the way it drafts its opt-in consent disclosure form.

PAB has received and processed a large number of opt-in consent disclosure form filings from insurers. It appears that insurers have welcomed the ability to transmit life insurance and annuity contract documents electronically, and are using this ability to transmit documents quickly, efficiently, and inexpensively.

PAB assumes the large number of opt-in consent disclosure form filings means a significant percentage of insurance consumers are agreeing to receive documents electronically. PAB believes that the voluntary opt-in, as opposed to opt-out, is very important, because many consumers will still want to have the default option to receive documents in paper form, especially important insurance documents.

2. Auto, Commercial, Property, and Earthquake Insurance.

Under Proposition 103, any property/casualty insurer that wants to change its rates is required to file a detailed rate application and obtain the Commissioner’s prior approval before using the new rates. Similarly, if a property/casualty insurer wants to change its rules, forms, and/or programs in a way that will have any impact on the rates to be charged, that insurer must also obtain the Commissioner’s prior approval before making any such change.

The Department's Rate Regulation Bureau (RRB) implements the provisions of Proposition 103 prior approval of rates for property and casualty insurers and reviews prior approval rate applications for compliance.

To date, RRB has found at least three instances in which an insurer rate applicant has proposed a "paperless discount" or has sought to charge a fee for policyholders who decline to opt-in to electronic transmission, in violation of Insurance Code § 38.6(b)(11):

a) An insurer requiring a per installment charge (e.g. $2) for any insured who does not receive paperless billing.
b) An insurer charging a higher policy fee (e.g. $75 versus $65) for insureds who were not choosing the paperless option.
c) An insurer offering a discount (e.g. 2%) on all policy premiums when the insured elects electronic policy delivery.

RRB reports it has not experienced difficulty in requiring insurers' compliance with Insurance Code § 38.6(b)(11) in these instances. However, there may be additional instances in which insurers charge a fee for insureds who decline to opt-in to electronic transmission, where the insurer has not reported that fee as part of a prior approval rate application.

RRB also reports that in at least one instance it has approved a rate application in which the insurer does business solely via electronic means.

Since January 1, 2016, RRB has not noticed any appreciable decrease in insurers' aggregate average expenses used for purposes of Proposition 103 rate-making.. Based on the fact that there are few instances where paperless documentation programs are being reported in prior approval rate applications, this may suggest that not many insurers are offering the opportunity for paperless transactions to insureds under Insurance Code § 38.6 for property/casualty rate-making.

Overall, RRB believes that the opt-in requirements of Insurance Code § 38.6 provide an important safeguard against potential disparate impact situations. Certain segments of the population may not have the inclination, aptitude, or ability to conduct their personal business via electronic means, and having such opt-in requirements in place ensures equal opportunity for those individuals. And given the variation at which insurers elected to approach this situation, as indicated above, the Insurance Code § 38.6 requirements create an opportunity for uniformity where consistency may have been previously lacking.

3. Consumer Complaints Received by the Department.

The Department's Consumer Services Division (CSD) is responsible for gathering and responding to consumer inquiries and complaints regarding insurance company or agent/producer activities. CSD maintains separate bureaus to handle telephone inquiries, respond to consumer complaints on claims handling practices, respond to rating and underwriting based consumer complaints, and to provide education to the public on insurance issues. The goal of CSD is primarily to protect California insurance consumers through enforcement of the California Insurance Code and related laws and regulations.

With respect to the consumer complaints submitted to the Department, CSD has observed the following issues:

- The prohibition against an insurer charging consumers who decline to opt-in to electronic transmission or an insurer providing a discount for such opt-in, as outlined in Insurance Code § 38.6(b)(11).
- The sufficiency of the opt-in language, as set forth in Insurance Code § 38.6(b)(1).
- The five-year record retention requirements in Insurance Code § 39.6(b)(3).
- The send-and-receive standards under Insurance Code § 38.6(b)(7).

<u>Charges/discounts are prohibited</u>. During the course of investigating the complaints, CSD determined that some insurers were impermissibly charging a fee to consumers who declined to opt-in to electronic transmission. CSD determined that a total of 192,832 insureds had been improperly charged a fee for declining to opt-in to electronic transmission. After CSD's investigation, $8,743,297.80 was refunded to consumers.

When CSD investigated another complaint, we observed that the insurer was offering a discount to induce insureds to consent to electronic transmission as prohibited in Insurance Code § 38.6(b)(11).

<u>Insufficient opt-in language</u>. In investigating consumer complaints, CSD has noticed that property and casualty insurers are not disclosing all the information required to be given to obtain an insured's consent to electronic transmission. In some instances, the consent disclosure did not set forth the policyholder's email address and, in other instances, the disclosure did not list the records that would be electronically delivered. Unlike life insurance, forms and notices required to be sent by property and casualty insurers (while they are reviewed for compliance with Proposition 103), are not required to be submitted to the Department for approval.

<u>Record retention</u>. In investigating whether a record was electronically sent to the insured on a timely basis, CSD learned that the company only maintains the electronic transmission logs for a 90-day period. CSD is working with the company to address its noncompliance with the five-year retention requirement under Insurance Code § 38.6(b)(3).

<u>Send-and receive standards under Insurance Code § 38.6(b)(6) and (7)</u>. CSD received complaints involving whether the records were electronically sent on a timely basis. As these complaints are in the early investigatory stages, no conclusions can be drawn at the time of this Report as to whether there is a compliance issue with the send-and receive standards.

<u>Pending market conduct examinations</u>. The Market Conduct Division (MCD) is part of the Consumer Services and Market Conduct Branch (CSMCB). MCD's Field Rating and Underwriting Bureau (FRUB), as part of its statutory market conduct exam work mandated by Insurance Code § 730, performs reviews of insurers' processes and procedures for compliance with Insurance Code § 38.6.

Since the statute took effect on January 1, 2016, the Commissioner has adopted one FRUB examination report containing an alleged violation of Insurance Code § 38.6. The examination report covered the sales, marketing, rating and underwriting activities of a life insurer and the alleged violations pertained to noncompliant components within the opt-in consent disclosure. The insurer agreed to amend its opt-in consent disclosure to comply with Insurance Code §38.6(b).

As of the date of this Report, FRUB has five examinations pending (three property and casualty insurance, and two life insurance), where potential noncompliance with Insurance Code § 38.6 has been identified. The allegations of noncompliance will be addressed via the ongoing market conduct examination process for the subject insurers.

C. Stakeholder - Impact and Implementation of Insurance Code § 38.6.

The Department solicited feedback at multiple times from the Personal Insurance Federation of California (PIFC), the newly formed American Property Casualty Insurance Association (APCIA), the Association of California Life and Health Insurance Companies (ACLHIC) and consumer groups, such as the Consumer Attorneys of California (CAOC), the Consumer Federation of California, Consumer Watchdog, and United Policyholders, to compile this report.

1. Insurance Companies.

The property and casualty trade associations sponsored AB 2591 and supported the bill as it moved through the legislative process. However, some of their member companies have found the provisions outlined in the bill to be “overly burdensome” making it hard for them to take full advantage of transmitting documents electronically. Specifically, members of PIFC have found the requirements in California “differ substantially from those that have been adopted in other states” and that the inconsistency has raised “key cost considerations” on a state-by state basis. Although many companies have not fully taken advantage of their ability to transmit documents electronically, they are willing to work collaboratively with the Department to review the remaining electronic transmission prohibitions and expand electronic consumer options that consumers demand while maintaining important consumer protections.

APCIA and ACLHIC stated that their member companies did not have any feedback to share when asked about their AB 2591 implementation experiences.

2. Consumer Groups.

The Consumer Attorneys of California opposed AB 2591 during the legislative bill deliberation process because they were concerned about the serious consequences associated with a consumer not receiving critical documents related to the reduction or cancellation of coverage, such as financial exposure to significant uninsured losses for auto accidents and damage to one’s home. They also stated that it was crucial that consumers actually receive these documents in writing and that the same rules that may be acceptable for telephone bills or credit card statements are not appropriate for auto and home insurance. Their concerns remain unchanged. CAOC members’ concern continue to be about the safeguarding of policies which may be cancelled or non-renewed because people do not receive the notices in time or they get stuck in a variety of spam filters and then they lose their policies. CAOC supports safeguards such as before a nonrenewal or cancellation can occur, the insurer must send a final 30-day notice by certified mail to ensure the policyholder has received the notice.

The Consumer Federation of California, Consumer Watchdog, and United Policyholders stated that they did not have any feedback to share when asked about their AB 2591 implementation experiences.

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[i] In the current version of Cal. Civil 1633.3, these are the documents exempted from e-transmission:

CIC § 786 as it applies to individual and group disability policies.
DISABILITY. 30-day examination period for seniors.

CIC § 10192.18
HEALTH INSURANCE withdrawal from the market

CIC § 10199.44
GROUP HEALTH – cancellation thereof.

CIC § 10199.46
NORPROFIT HOSPITAL SERVICE PLAN – cancellation thereof.

CIC § 10235.16
LONG TERM CARE – replacement of existing policy

CIC § 10235.40
LONG TERM CARE – designation of individuals to receive notice of lapse or termination of policy

CIC § 11624.09
ASSIGNED RISK PLANS - Notice to applicant that certificate of eligibility is defective.

CIC § 11624.1
ASSIGNED RISK PLANS - licensee shall mail policy within 30 days of the receipt of assignment.

[ii] Note that there are two published versions of CIC § 678.1 – the first is effective until 1/1/2019 and the second is effective on 1/1/2019.