

California Department of Insurance
Report on the Impact and Implementation of the Authorization to Transmit Specified
Records Electronically Pursuant to AB 1065 (effective January 1, 2020) as Codified in
California Insurance Code Section 38.6, Subdivision (d)

On September 5, 2019, [Assembly Bill \(AB\) 1065](#), authored by Assembly Member Marc Berman, was signed by Governor Gavin Newsom as Chapter 235, Statutes of 2019. AB 1065 removed a sunset date provision in California Insurance Code section 38.6 to authorize insurers to transmit insurance records online with additional consumer protections, including authorizing new intermediate enforcement procedures to ensure that companies are complying with the provisions of this important electronic transmission law. In addition, this bill required the California Insurance Commissioner (Commissioner) to submit a report to the Governor and State Legislature regarding insurer compliance with laws governing electronic transmissions of insurance records by January 1, 2022. (All statutory references are to the Insurance Code unless otherwise indicated.)

A. Background

Civil Code section 1633.1 et. seq. permits people and entities in California to engage in electronic transactions and to sign documents electronically. Civil Code section 1633.3 exempts certain types of transactions from the permission granted by Civil Code section 1633.1, et. seq., meaning these types of transactions must be accomplished using paper and ink signatures.¹

Section 38.6 applies when a person or entity licensed under the Insurance Code wants to transmit a required written record electronically. Section 38.6 applies to all licensees under the Insurance Code, including agents and brokers as well as insurers. For ease of reference, in this report, licensees are referred to as “insurers.”

Section 38.6 allows insurers to transmit almost all insurance records electronically, including renewal offers, notices, and disclosures, provided the insurer obtains the consent of the consumer before sending the records electronically, as long as the electronic transmission is not prohibited by Civil Code section 1633.3, subdivisions (b) and (c). Section 38.6 sets forth requirements for the consumer’s opt-in consent agreement (hereinafter opt-in agreement).

Section 38.6, subdivision (d) requires the Commissioner to report to the Governor and State Legislature on or before January 1, 2022. Section 38.6, subdivision (d) states:

On or before January 1, 2022, 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 insurer compliance with laws governing electronic transmissions of insurance transactions, including renewal offers, notices, or disclosures. The commissioner shall ensure the report addresses the use of electronic transmissions by insurers conducting the business of insurance, the department’s enforcement actions relating to those electronic transmissions, and the impact of those enforcement actions on insurer compliance rates.

The statute requires the Commissioner to report on the following points, with regard to all types of insurance:

- Insurer compliance with laws governing electronic transmissions of insurance transactions, including renewal offers, notices, or disclosures.
- The use of electronic transmissions by insurers conducting the business of insurance.
- The Department’s enforcement actions relating to those electronic transmissions.
- The impact of those enforcement actions on insurer compliance rates.

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B. Policy Form Review for Compliance with Section 38.6.

1. Life and Disability Insurance.

The opt-in agreement can be set forth in an application or in another document that becomes part of a policy approved by the Commissioner. (§ 38.6, subdivision (b)(3).) As part of its responsibility reviewing life, annuity and disability products that are subject to prior approval, the California Department of Insurance's (Department's) Policy Approval Bureau (PAB) has reviewed, disapproved, and approved numerous opt-in agreements submitted by insurance companies.

Regarding the impact and implementation of section 38.6 as it applies to disability policies, 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 agreements do not comply with applicable law when initially filed with the Department for review.

Several examples of errors commonly found in initially filed opt-in agreements include:

- a) Failure to clearly state that the consumer's decision to receive records electronically is voluntary. (§ 38.6, subdivision (b)(2)(A).)
- b) Failure to state that the consumer may opt out from receiving records electronically at any time, or failure to state the process for opting out. (§ 38.6, subdivision (b)(2)(B).)
- c) Failure to adequately describe the records that will be sent electronically. (§ 38.6, subdivision (b)(2)(C).)
- d) Failure to state the "process or system" for the person to report a change or correction to their e-mail address. (§ 38.6, subdivision (b)(2)(D).)
- e) Failure to place the consumer's signature line/opt-in button/consent button immediately below the opt-in agreement. (§ 38.6, subdivision (b)(3).)
- f) Failure to include a place for the consumer's e-mail address on the opt-in agreement. (§ 38.6, subdivision (b)(4).)
- g) Failure to include language saying that the consumer is entitled to one free printed copy of any record upon request. (§ 38.6, subdivision (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 section 38.6, subdivision (b)(10)(A).
- i) Inclusion of language that requires the consumer to pay a fee to receive records on paper, or grant a discount for agreeing to electronic transmission. (§ 38.6, subdivision (b)(11).)
- j) Inclusion of language that requires the consumer to give up rights or waive any objections concerning use of the insurer's website in order to opt-in to receive required written insurance records electronically. For example, the opt-in agreement is not permitted to require that the consumer hold the insurer harmless, agree to another jurisdiction for disputes, or waive warranties. This type of language exceeds the scope of opt-in agreements permitted by section 38.6. In addition, by imposing conditions on the consumer's right to opt in, it makes the consumer's right to receive electronic transmissions of insurance records narrower and more limited than the right granted to consumers by section 38.6.

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

The Department's Rate Regulation Branch (RRB) implements the prior rate approval provisions of Proposition 103 for property and casualty (P&C) insurers. RRB reviews policy forms to the extent there are changes that may have an impact on the rates but does not specifically review insurers' policy forms for

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compliance with section 38.6. Since the prior report in 2019, RRB has observed that there has been a small increase in the number of insurers indicating that their products, or certain features of the product they are transacting, would be handled via electronic means. RRB has not had experience with enforcement actions relating to the electronic transmission of records.

C. Consumer Complaints Regarding Section 38.6 Compliance Issues.

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, CSD has observed the following issues regarding insurers' compliance with section 38.6 since the last report provided to the Governor and State Legislature (2019):

1. **Insufficient opt-in agreement disclosures given to consumers.** CSD found that certain life insurers' and P&C insurers' opt-in agreements:
 - a) Did not include the consumers' email addresses, as required by section 38.6, subdivision (b)(4).
 - b) Did not include a description of the records to be e-transmitted, as required by section 38.6, subdivision (b)(2)(C).
 - c) Did not include the process to change email addresses, as required by section 38.6, subdivision (b)(2)(D).
2. **Charging consumers who declined to opt in to e-transmission.** In a consumer complaint against a P&C insurer, CSD found that the insurer's underwriting guidelines filed with CDI provided that a higher policy fee would be charged for consumers who did not opt in to e-transmission, in violation of section 38.6, subdivision (b)(11). After the Department's intervention, the company re-filed its underwriting guidelines without the higher policy-fee provision.
3. **Send-and-receive standard.** When California law requires an insurer to send a record by return receipt, certified mail, or other method of delivery evidencing actual receipt by a person, the insurer must follow the procedure set forth in section 38.6, subdivision (b)(7) when it sends that record electronically. CSD has received consumer complaints that P&C insurers are sending policy-termination notices to policyowners in violation of section 38.6, subdivision (b)(7). CSD is currently obtaining additional information about the companies' e-transmission processes to ascertain whether insurers are complying with the statute's requirements.
4. **Acquiring consumers' consent.** An issue of growing concern is that insurers who transact business online are rendering consumers' opt in to e-transmission compulsory rather than voluntary and burying this fact within the "terms of use" that govern the use of the insurers' website or app. Because consumers must voluntarily opt in to e-transmission, even if an insurer may transact business online, insurers cannot compel consumers to accept e-transmission. Section 38.6 does not contain any exceptions to the requirement that opting in to e-transmission must be voluntary on consumers' part. The opt-in agreement and the signature portion of the opt-in agreement must only pertain to the items outlined in section 38.6 and the acknowledgement shall not apply to items or requirements outside of section 38.6 such as website "terms of use," computer system requirements, or other non- section 38.6 elements.

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CSD observed P&C insurers that included the opt-in agreement within their terms of use for the website/app, and the agreement was set forth in a way that consent was not being acquired but rather established by virtue of purchasing a policy. The issue is currently being addressed so that the insurers' opt-in agreements are set forth as a separate document limited to the elements outlined in section 38.6, and that opting in to e-transmission is voluntary.

D. Market Conduct Examinations.

The Department's Market Conduct Division (MCD), as part of its statutory market conduct exam work mandated by section 730, performs reviews of insurers' processes and procedures for compliance with section 38.6.

Since the Department's last report to the Governor and State Legislature (2019) regarding section 38.6, the Market Conduct Division completed and finalized one examination report that included alleged violations. In order to resolve the issues, the insurer implemented corrective actions to comply with section 38.6.

As of December 2021, 43% of MCD's examinations in progress for compliance with section 38.6 have identified alleged areas of non-compliance. 67% of these examinations in progress are of life, health, and disability (LHD) insurers and 33% are of P&C insurers. MCD is working with these insurers on resolutions to bring their practices into compliance before the examinations are completed and finalized. Areas of non-compliance include:

1. Failure to obtain an opt-in agreement to electronic transmission from a person prior to transmission of a required written record from a licensee to a person. (§ 38.6, subdivision (b)(1).)
2. Inclusion of language within the opt-in agreement that requires the consumer to waive certain rights, in order to receive records electronically. (§ 38.6, subdivision (b)(2).)
3. Failure to clearly state in the opt-in agreement that the consumer's decision to receive records electronically is voluntary. (§ 38.6, subdivision (b)(2)(A).)
4. Failure to state in the opt-in agreement that the consumer may opt out from receiving records electronically at any time, or failure to state the process for opting out. (§ 38.6, subdivision (b)(2)(B).)
5. Failure to adequately describe in the opt-in agreement which records will be sent electronically. (§ 38.6, subdivision (b)(2)(C).)
6. Failure to state in the opt-in agreement the "process or system" for the person to report a change or correction in their e-mail address. (§ 38.6, subdivision (b)(2)(D).)
7. Failure to include the licensee's contact information in the opt-in agreement. (§ 38.6, subdivision (b)(2)(E).)
8. Failure of a Life and Annuity insurer to file the opt-in agreement for prior approval. (§ 38.6, subdivision (b)(3).)
9. Failure to place the consumer's signature line/opt-in button/consent button immediately below the opt-in agreement. (§ 38.6, subdivision (b)(3).)
10. Failure to include the consumer's e-mail address on the opt-in agreement. (§ 38.6, subdivision (b)(4).)
11. Failure to include language on the opt-in agreement stating that the consumer is entitled to one free printed copy of any record upon request. (§ 38.6(b)(5).)
12. Failure to maintain evidence of send and receive for records that are subject to this standard. (§ 38.6, subdivision (b)(7) and (10).)
13. Failure by the insurer to attempt delivery as set forth in section 38.6, subdivision (b)(10)(A).

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14. Failure to verify a person's email address via paper writing sent by regular mail when more than twelve months have elapsed since the licensee's last electronic communication.
(§ 38.6, subdivision (b)(12).)

39% of MCD's examinations in progress have no alleged violations of section 38.6 (to date) because the insurers reported that they do not transmit required written records electronically, and no evidence to the contrary was found. 21% of these examinations are of LHD insurers and 79% percent of these examinations are of P&C insurers.

For 18% of MCD's examinations in progress, the review of compliance with section 38.6 is pending.

E. Conclusion/Enforcement Actions.

The Department is seeing many insurer violations of section 38.6 for all insurance coverages. To date, the Department has been successful in enforcing compliance with section 38.6 through its prior approval process, resolution of consumer complaints, and market conduct examinations, without the need for formal legal proceedings. In the future, if insurer violations increase or if insurers repeat the same violations, it will be appropriate for the Department to exercise its authority to bring formal enforcement actions pursuant to section 38.6 subdivision (f).

ⁱCivil Code section 1633.3, subdivision (c), effective 1/1/2020. These are the insurance records currently exempted from e-transmission:

- Section 786 as it applies to individual and group DISABILITY. 30-day examination period for seniors.
- Section 10192.18 HEALTH INSURANCE withdrawal from the market
- Section 10199.44 GROUP HEALTH cancellation.
- Section 10199.46 NONPROFIT HOSPITAL SERVICE PLAN cancellation.
- Section 10235.16 LONG TERM CARE – replacement of existing policy
- Section 10235.40 LONG TERM CARE – designation of individuals to receive notice of lapse or termination of policy
- Section 11624.09 ASSIGNED RISK PLANS – notice to applicant that certificate of eligibility is defective.
- Section 11624.1 ASSIGNED RISK PLANS – licensee shall mail policy within 30 days of the receipt of assignment.