AUGUST 2002

WEST VIRGINIA INFORMATIONAL LETTER

NO. 135A

TO: All Insurance Companies Licensed to Do Business in the State of West Virginia, Insurance Trade Associations, Insurance Media Publications and All Other Interested Persons

RE: Electronic Transaction of Insurance

The purpose of this letter is to revise Informational Letter 135 (July 2002) that was mailed on July 29, 2002. Please refer to our web site www.wvinsurance.gov to reference Informational Letter 135.

Due to the undue burden on companies and agents, the web site address filing required under the headings APPLICATION OF UETA TO INSURANCE REGULATION - Information Retention and Submission Requirements, is hereby deleted and the form omitted. While such information may from time to time be requested, the mandatory requirement is no longer in effect. This change does not remove the statutory filing requirement with respect to forms and/or products.

Any questions you may have regarding this Informational Letter can be directed in writing to Gara A. Hoke, Associate Counsel or Vincent J. King, General Counsel, Legal Division, West Virginia Insurance Commission, P.O. Box 50540, Charleston, WV 25305-0540.

Jane L. Cline
INSURANCE COMMISSIONER

JULY 2002

WEST VIRGINIA INFORMATIONAL LETTER

NO. 135

TO: All Insurance Companies Licensed to Do Business in the State of West Virginia, Insurance Trade Associations, Insurance Media Publications and All Other Interested Persons

RE: Electronic Transaction of Insurance

The purpose of this informational letter is to update you regarding Senate Bill 204, the Uniform Electronic Transaction Act, (hereinafter UETA), passed during the 2001 regular legislative session, to explain UETA's affect on the transaction of insurance in West Virginia and to identify certain insurance laws and principles which you must keep in mind when transacting insurance on the Internet in West Virginia.

UETA Generally

UETA became effective on July 13, 2001,[1] and is primarily located in West Virginia Code Sections 39A-1-1 et. seq. However, UETA also creates a new consumer protection article located in West Virginia Code Sections 46A-6I-1 et. seq.

If the parties agree and if the transaction complies with UETA, UETA generally permits the use of electronic records, contracts[2] and signatures in West Virginia transactions, including insurance transactions, even where existing laws require creation, delivery and retention of written signatures and documents. (W. Va. Code § 39A-1-2 et. seq.) UETA does not abolish any existing statutory, administrative or common law transaction requirement existing under West Virginia law, except that UETA allows those transactions to be completed, delivered, received and retained electronically.

What UETA Does Not Do

UETA does not affect laws which specify or relate to the content of a document. W. Va. Code § 39A-1-3(g)(1) (Supp. 2001). As such, whenever West Virginia law relates

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[1]UETA applies to those transactions which are conducted after its effective date. W. Va. Code § 39A-1-3(j); W. Va. Code § 39A-1-4 (Supp. 2001).

[2]Records and contracts may hereinafter be collectively referred to as documents.

to or specifies the content of a document, these laws apply to electronic documents in the same manner as they apply to written documents.[3]

Notwithstanding the foregoing, there are certain conditions that parties cannot impose upon the other. First, parties cannot require that the other accept electronic signatures or documents or transact business electronically. W. Va. Code § 39A-1-3(e)(2); W. Va. Code § 39A-1-5(a) (Supp. 2001). Similarly, neither party can insist that the parties continue to transact business electronically, even after they have done so previously. W. Va. Code § 39A-1-5(c) (Supp. 2001).

Validity of Electronic Signatures and Documents

Under the provisions of UETA, signatures and documents will not be denied legal effect or validity solely because they are in electronic form or were created or used in an electronic transaction so long as the signature or document complies with the provisions of UETA.[4] W. Va. Code § 39A-1-7(a), (b) (Supp. 2001). An electronic signature or document can be used instead of a written signature or document whenever the law requires that it be in writing. W. Va. Code § 39A-1-7(c), (d) (Supp. 2001). However, the Secretary of State is required to promulgate rules to establish standards and processes to facilitate the use of electronic signatures. Until such time, electronic signatures cannot be used.

Electronic Delivery

Likewise, if the parties have agreed to transact business electronically, but another law requires that the signature or document be delivered traditionally,[5] that requirement will be satisfied by delivery of an electronic signature or document if capable of retention by the recipient at the time of the receipt according to rules promulgated by the Secretary of State. W. Va. Code § 39A-1-8(a) (Supp. 2001). As more fully discussed in the next section, whether a signature or document is capable of retention is determined under the provisions of West Virginia Code Section 39A-1-12(a)-(g) (Supp. 2001).

Although UETA allows for delivery of signatures and documents, UETA does not affect laws which specify the timing of the delivery except to the extent that it explains when the signatures or documents are deemed sent and received. W. Va. Code § 39A-1-3(g)(1); W. Va. Code § 39A-1-15 (Supp. 2001). Therefore, whenever Chapter 33, a rule, an administrative interpretation or some other law specifies the time frame for delivery of a document, those laws apply to electronic signatures and documents in the same manner

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[3]Examples of statutory content requirements include, but are not limited to: West Virginia Code Sections 33-6-11; 33-6-12; 3-6-14; 33-6B-3; 33-13-4; 33-13-5; 33-13-33; 33-13-35.

[4]An oral communication or a recording thereof does not qualify as an electronic transaction. W. Va. Code § 39A-1-3(k) (Supp. 2001).

[5]Traditional delivery methods required that a document or signature be in writing and delivered by hand or mail.

as they apply to written signatures and documents. For determination of when a document is sent and the delivery time begins to run, see W. Va. Code § 39A-1-15(a) (Supp. 2001). For determination of when an electronic record is received, see W. Va. Code § 39A-1-15(b) and W.Va. Code § 46A-6I-3 (Supp. 2001).

Electronic Retention

As heretofore mentioned, if a law requires that a document be retained in its original form, the law is satisfied by an electronic document retained in accordance with West Virginia Code Section 39A-1-12(a) (Supp. 2001). W. Va. Code § 39A-1-12(d) (Supp. 2001). Section 12(a) provides that a record retention requirement is satisfied by retention of an electronic record which accurately reflects the document as generated in its final form and which remains accessible for later reference. W. Va. Code § 39A-1-12(a) (Supp. 2001). Similarly, if a law requires retention of a check, an electronic record of the information from the front and back of the check retained in accordance with Section 12(a) will satisfy that law. W. Va. Code § 39A-1-12(e) (Supp. 2001). Nevertheless, a document is not capable of retention if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic document. W. Va. Code § 39A-1-8(a) (Supp. 2001).

Electronic Verification, Notarization and Acknowledgment

Besides providing for the legal validity of the electronic creation, delivery, receipt and retention of electronic signatures and documents executed in accordance with UETA, UETA further provides for the validity of electronic verifications and acknowledgments. Thus, where a law enacted prior to UETA requires that a document be verified or that receipt be acknowledged, the document may be provided or made available electronically if the electronic method used provides the requisite verification or acknowledgment of receipt. W. Va. Code § 39A-1-3(g)(2) (Supp. 2001). Likewise, Section 39A-1-11 provides that where a law requires a signature or document to be notarized, acknowledged, verified or made under oath, the requirement will be satisfied if the electronic signature of the notary (or the person authorized to perform those acts), and all other information required to be included by the other law, is attached to, or logically associated with, the signature or document. The law governing the use of an electronic notarization, acknowledgement or verification will be set forth in a rule to be written, promulgated and regulated by the Secretary of State. W.Va. Code § 39A-2-2,3 (Supp. 2001). See also, W.Va. Code § 39A-1-11 (Supp. 2001).

There are sections of Chapter 33 of the West Virginia Code that require notarized signatures. The Secretary of State will regulate the use of an electronic notarization under rules to be promulgated by that office. Until an electronic notarization seal can be obtained from the Secretary of State, insurers and agents will be required to complete notary transactions in accordance with the laws of the State of West Virginia. Once the Secretary of State's office provides notice to our office of how an electronic notarization seal is to be accessed and used, this office will advise you.

APPLICATION OF UETA TO SPECIFIC INSURANCE TRANSACTIONS

The UM/UIM Forms

West Virginia Code Section 33-6-31d requires that all insurers make available mandatory uninsured motor vehicle coverage, (hereinafter UM coverage) and optional underinsured motor

vehicle coverage, (hereinafter UIM coverage), required to be offered by West Virginia Code Section 33-6-31 on a form prescribed by the Insurance Commissioner. The current form was sent with Informational Letter 121 in July 2000 with instructions that required the form to be completed in the insured's own handwriting and be delivered by mail or by hand.

Because the Legislature codified its intent to permit electronic signatures where written signatures are otherwise required,[6] and electronic delivery where traditional methods of delivery are otherwise required,[7] the UM/UIM form can now be provided to the named insured in electronic form[8] and be completed by the insured electronically, although signatures must be completed traditionally until such time as the electronic signatures rules are promulgated by the Secretary of State. The form no longer must be completed in the insured's own handwriting or delivered by hand or mail if completed electronically and returned electronically in compliance with UETA. Nevertheless, the content of the form will remain the same as the form set forth in Informational Letter 121.

To that end, in making the form available on the Internet, it must continue to include the information required[9] and to conform to the required minimum 10 point font size and a commonly used font face. See Informational Ltr. 121 at page 3. Informational Letter 121 also requires that bold face print remain bold face and appear bold face on the Internet and printed form. So long as the form complies with these requirements and sets forth at least the requisite contents, the form need not be an exact duplicate of the form provided with Informational Letter 121.

Informational Letter 130 provides a form for the selection or rejection of purchases of excess uninsured/underinsured liability coverage. See Informational Letter 130 (June 2001). This form can be provided electronically, completed, and retained electronically so long as each is done in complete compliance with UETA and the requirements set forth in Informational Letter 130. However, signatures must be obtained traditionally and forms returned traditionally until such time as appropriate rules are promulgated by the Secretary of State. As with the forms required by West Virginia Code Section 33-6-31d, the forms required by 33-6-31f need not be exact replicas of the Commissioner's form so long as the form contains all the information required by Informational Letter 130, meets the minimum 10 point font size requirement, uses a commonly accepted font face and bolds the areas that appear in bold on the Commissioner's form.

W. Va. Code Section 33-6-5a: Completion of Life Insurance Application in the Presence of the Insured

West Virginia Code Section 33-6-5a governs applications for life and accident and sickness insurance which are issued in West Virginia. Section (a)(2) provides that if application is made by the proposed insured, [it shall] be completed by a licensed and appointed agent in the presence of the proposed insured. W. Va. Code § 33-6-5a(a)(2) (Repl. Vol. 2000). The code requires completion in the presence of the proposed insured to assure that all the information contained in the completed application

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[6]W.Va. Code § 39A-1-7 (Supp. 2001).

[7] W.Va. Code § 39A-1-8(a) (Supp.2001).

[8]Consent of the partner required 39A-1-8(a) (Supp. 2001).

[9]W.Va. Informational Letter 121, at page 2.

has been obtained from the insured and accurately reflected by the agent.[10]

In the event that an agent is involved in and completes the application for the proposed insured, notwithstanding UETA, the agent remains required to do so in the presence of the insured. This requirement applies regardless of whether the application is completed electronically or traditionally. W. Va. Code § 33-6-5a(a). The agent and the insured can still meet, complete an application electronically, sign in person and submit it to the company in the traditional manner in compliance with UETA.

However, if an insurer offers life insurance under West Virginia Code Sections 33-6-5a(d) and 33-6-35, if the product is mass marketed, it can be solicited and sold without agent involvement.[11] A proposed insured can obtain an application from the Internet, print it, personally complete, sign and submit the application directly to the insurer without agent intervention. In this instance, an agent is not involved and the presence requirement does not apply. After the appropriate rules for electronic signatures have been promulgated, signatures will be able to be completed electronically.

Section (c) provides any amendments made to an application after it is signed by the proposed insured shall be disclosed in writing to the proposed insured and verified by obtaining his signature. This disclosure is satisfied if made electronically, the proposed insured's signature is electronically affixed to the amendment, and both are done in compliance with UETA.

W. Va. Code Sections 33-6-15 and 33-12-7: Insurer Execution and Countersignature Requirements

West Virginia Code Section 33-6-15 requires every insurance policy to be executed in the name of, and on behalf of, the insurer. This statute requires that the signature be in original handwriting unless it is a policy approved for sale by a vending machine. W. Va. Code § 33-6-15 (Rep. Vol. 2000). In accordance with West Virginia Code Section 33-6-15, West Virginia Code Section 33-12-7 provides that every contract of insurance covering a West Virginia risk is to be signed or countersigned by a licensed resident agent or licensed excess line broker.[12] Because UETA provides for the use of an electronic signature[13] where an original signature is required by

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[10]This requirement protects all the parties to the transaction: the insurer can more readily rely on the veracity of the representations in the application when evaluating risk and paying claims; the insured can be more assured that coverage will not be denied on the basis of misrepresentation and the agent can be more assured that the proposed insured agrees with the information reflected by the agent in the application. Consequently, whenever an agent is involved in and completes an application for a proposed insured, the agent must be in the insured's presence.

[11]If an agent is not involved in the transaction, the insurer must meet all the requirements set forth in West Virginia Code Sections 33-6-5a(d) and 33-6-35 if the application is mass marketed. W. Va. Code § 33-6-5a(d)(3) (Repl. Vol. 2000).

[12] H.B. 4497, the Agents Licensing Bill passed by the 2002 West Virginia Legislature, recodifies W.Va. Code § 33-12-7 at W.Va. Code § 33-12-11. Governor Bob Wise signed H.B. 4497 on April 3, 2002, thus making the statutory change effective.

[13]See UETA, W. Va. Code § 39A-1-7(c), (d) (Supp. 2001).

another law,[14] these signatures may now be proffered and affixed electronically so long as they are affixed in accordance with UETA as set forth above. After the appropriate rules for electronic signatures have been promulgated, signatures will be able to be completed electronically.

PRINCIPLES RELATING TO THE ELECTRONIC TRANSACTION OF INSURANCE ON THE INTERNET

Any person or entity which transacts insurance with West Virginia residents over the Internet is transacting insurance in West Virginia and must comply with all West Virginia laws. To determine what constitutes the transaction of insurance in West Virginia when the transaction is electronic, the West Virginia Insurance Commission will apply applicable state and federal laws which include the following insurance principals and definitions.

Relevant Definitions

Person means any natural person or entity, including, but not limited to, individuals, partnerships, associations, bona fide associations, trusts, trustees, companies, insurers, unauthorized insurers, organizations, societies, reciprocals, syndicates, administrators, third-party administrators, agents, producers, advertisers, customer service representatives, promoters, officers, directors, lawyers, incorporators or any other legal entity. W.Va. Code § 33-44-3.

Solicitation and solicit mean attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company, including without limitation, providing rate comparisons of various insurers based on information provided by the person. W.Va. Code § 33-44-3 (Repl. Vol. 2000).

Transaction of insurance means any of the following acts in this state effected by mail or otherwise (including electronically), and is considered to constitute the transaction of an insurance business in or from this state:

(1) The making of or proposing to make an insurance contract;
(2) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;
(3) The taking or receiving of an application for insurance;
(4) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration required for obtaining or renewing insurance;
(5) The issuance or delivery in this state of certificates or contracts of insurance to residents of this state or to persons authorized to do business in this state;
(6) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;

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[14]W.Va. Code § 33-6-15, 33-12-7 (Repl. Vol. 2000).

(7) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of insurance with respect to any risk or exposure located or to be performed in this state;
(8) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance;
(9) The offering of insurance or the transacting of insurance business; or
(10) Offering an agreement or contract which purports to alter, amend or void coverage of an insurance contract.

W.Va. Code § 33-44-3.

Unauthorized Insurers

Because no person shall act as an insurer in this state unless properly qualified as an insurer of a type permitted under the provisions of Chapter Thirty-three [33], no person shall be authorized to electronically transact the business of insurance in West Virginia without complying with the provisions of Chapters Thirty-three [33], Thirty-nine-a [39A] and Forty-six-a [46A] of the West Virginia Code, including, the rules and administrative interpretations.

Therefore, e-mails with web site attachments, forms, requests, cookies and lead generating devices of all kinds, which are sent directly to West Virginia residents' e-mail addresses are considered direct solicitations, and therefore, constitute the transaction of insurance in West Virginia as defined by West Virginia law. All West Virginia insurance, electronic transaction and consumer protection statutes, regulations and administrative interpretations apply as they would to any person or insurer operating in the paper environment and in person, including licensing requirements. Such direct solicitation without compliance with West Virginia law could result in administrative, civil and/or criminal penalties as set forth in Chapter Thirty-three [33] of the West Virginia Code and particularly in West Virginia's Unauthorized Insurers Act, as passed by the 2001 Legislature in West Virginia Code Section 33-44-3.

However, when insurance companies and agents make use of the Internet via passive means, the insurers are essentially doing business in the same way as they would when they advertise their products in magazines and provide a postcard for those interested to fill out and return to the company. In both situations, once the insurer receives a response from a consumer, the process of solicitation has begun. Therefore, passive sites are merely an extension of current advertising media, and all West Virginia insurance, electronic transaction and consumer protection statutes, regulations and administrative interpretations apply as they would to any person or insurer operating in the paper environment and in person.

If the insurer, agent, broker, adjuster or solicitor is not licensed to transact insurance and receives a request for information from a West Virginia resident, the insurer, agent, broker, adjuster or solicitor must deny the request, stating that the insurer, agent, broker, adjuster or solicitor is not authorized to transact business in the state of West Virginia. Any further business subsequently transacted could result in administrative, civil and/or criminal penalties as set forth

in Chapter Thirty-three [33] of the West Virginia Code and particularly in West Virginia's Unauthorized Insurers Act.

All insurers, whether authorized or unauthorized to transact insurance in West Virginia, are responsible for the actions and marketing practices of their agents, appointees, brokers, solicitors, adjusters and any other person soliciting the insurer's products or acting on behalf of such insurer. W. Va. Code § 33-12-23 (Repl. Vol. 2000).

All existing West Virginia laws requiring approval of advertising materials used for traditional methods of advertising apply to those advertising materials, including product descriptions, illustrations, web pages and other materials used, and available on the Internet.

Premium taxes must continue to be accounted for and paid on all insurance transactions in West Virginia by authorized and unauthorized insurers alike.

APPLICATION OF UETA TO INSURANCE REGULATION

Information Retention and Submission Requirements

With regard to existing laws applicable to and governing rates and forms filing requirements, all current requirements continue to apply as before. Internet advertising, solicitation and sales materials require rates and forms approval in the same manner as if being filed for use with any other type of media. Thus, any company desiring to solicit or transact insurance via the Internet must submit all materials to be used for electronic transaction of insurance in the same manner as is the current practice unless you are presently using materials which have been previously approved for traditional use. If you have obtained prior approval and no change is anticipated or made, you need not resubmit these materials for use in electronic transaction of insurance.

In addition to rates and forms filing requirements currently existing under West Virginia law, UETA requires that companies engaging in electronic commerce meet certain standards and provide certain protections to the consumers with which they are doing business. Therefore, any company intending to solicit or transact insurance over the Internet will be required to maintain, and possibly provide, information regarding these standards and protections.

Accordingly, West Virginia Code Section 39A-1-3(f)(3)(A) provides that a company engaging in e-commerce with West Virginia residents must provide the consumer with a statement of the hardware and software requirements for access to, and retention of, the electronic records. Id. This statement must be retained by the insurer and available for review by the West Virginia Insurance Commissioner upon request.

Insurers must also retain information describing the procedure for permitting a consumer to consent or confirm consent electronically in a manner that reasonably demonstrates that the consumer can access information in the electronic form. W. Va. Code § 39A-1-3(f)(3)(B). If the

hardware or software requirements change, those changes are also to be retained by the insurer for inspection. W. Va. Code § 39A-1-3(f)(4)(A)&(B) (Supp. 2001).[15]

Insurers must also retain security procedures for inspection. See W. Va. Code § 39A-1-2(14) (Supp. 2001). In accordance therewith and pursuant to the Insurance Commissioner's authority to examine this information, insurers are required to design their web application, (to be used by the insurer, its agents or appointees or consumers), in a manner that will clearly establish and identify: (1) from whom the agent or insurer received the information; (2) when it was received; (3) by whom it was received; (4) by whom the application was completed; (5) the contents of the completed application to be sent; (6) when the application was delivered to the proposed insured; (7) where it was delivered; (8) when it was delivered; (9) electronic confirmation by the proposed insured that the application accurately reflects the information delivered by the insured and received by the agent or insurer; (10) acceptance of the application by the insurer; (11) when acceptance is made by the insurer; and (12) the application in the form received by the proposed insured or agent. This information must be retained by the licensee for review by the Insurance Commissioner upon request.

Additionally, all persons transacting the business of insurance on the Internet shall provide the West Virginia Insurance Commission with all the web sites where the person or insurer will be engaging in e-commerce, including sites provided for sales and service to consumers, sites provided for instigating a complaint review and/or sites provided for regulatory contact. This information is to be submitted on the attached form to the following divisions of the West Virginia Insurance Commission: Information provided by insurers is to be submitted to Consumer Complaint Division, Kathleen Beck, Director. Information provided by agents is to be submitted to the Agent Licensing Division, Jane Strother, Director.

Those persons and insurers transacting insurance electronically in West Virginia must submit this information before transacting insurance electronically in West Virginia. If an agent or insurer is already transacting insurance electronically in West Virginia, and such information has not been previously provided, such information must be provided as instructed above within sixty (60) days from receipt of this informational letter.

Electronic Submission of Rates and Forms Filings and Company & Agent Electronic Filing

The West Virginia Insurance Commission recently began accepting submission of rates and forms filings in electronic form. Likewise, in the near future it will begin accepting agent licensing applications and company licensing applications in electronic form. However, the West Virginia Insurance Commission is not yet capable of accepting electronic transfers of costs. The agency is currently developing and accessing the technology necessary for electronic filing, and the West Virginia Insurance Commission is working with other state agencies to permit the electronic transfer of funds. You will be notified of the date that the West Virginia Insurance Commission will begin to accept electronic fund transfers.

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[15] Because UETA requires that this information be provided to the consumer, the Commissioner has the authority to examine the information if she deems it necessary. W. Va. Code § 33-2-4 (Rep. Vol. 2000).

Electronic Adjustment of Consumer Complaints

The West Virginia Insurance Commission also anticipates the electronic transmission and receipt of consumer complaints and company responses. As soon as the procedures for electronic adjustment are in place, you will be notified of this change. At that time, consumers will be permitted to elect as to completion of a paper complaint form or electronic complaint form. If the consumer submits a complaint electronically, the Consumer Complaint Representative will correspond electronically with the company, if the company agrees.

Questions

Any general legal questions you may have regarding this Informational Letter can be directed in writing to Gara A. Hoke, Associate Counsel or Vincent J. King, General Counsel, Legal Division, West Virginia Insurance Commission. All other questions can be directed to the director of the Division indicated.

Jane L. Cline
INSURANCE COMMISSIONER