

## Electronic Signatures: How Do They Work for Medicaid and CHIP?

by Tricia Brooks

### Introduction

**Electronic signatures, along with online applications, promote administrative efficiency and ease of access to public coverage programs.** While more than half of the states accept electronic signatures for their Medicaid and the Children's Health Insurance Program (CHIP) online applications, some states have expressed hesitancy in adopting electronic signatures due to the sometimes-confusing intersection of various federal and state laws impacting state policies and implementation. Electronic signatures are clearly permissible, however, federal guidance on a number of related questions could accelerate state implementation. This brief seeks to examine the policy and relevant issues surrounding their use.

More importantly, going forward online applications and electronic signatures will no longer be optional for states. The Affordable Care Act (ACA) requires that, as a condition of receiving federal Medicaid funds beginning January 1, 2014, states must establish an internet website allowing individuals to apply for, enroll in and renew coverage using electronic signatures.<sup>1</sup> This vision for seamless access to coverage through a single web portal, if implemented properly, will ensure that individuals are screened and enrolled in the appropriate coverage option, be it Medicaid, CHIP or the Exchange.<sup>2</sup> Considering this requirement, any lingering uncertainty over the implementation of electronic signatures needs to be resolved.

### Guidance from CMS

The Centers for Medicaid and Medicare Services (CMS) has not released specific guidance via a State Medicaid Director letter, State Official letter, or final regulation relating to the use of electronic signatures in applying for Medicaid and the (CHIP). However, a

2001 CMS publication on enrollment and retention states that electronic signatures are permitted, as long as they are authorized by state law.<sup>3</sup> There also have been verbal statements by CMS staff on the permissibility of electronic signatures assuming these basics are followed:<sup>4</sup>

- 1) The signature must be permitted by state law;
- 2) The state ensures identity verification (e.g. the process that attributes the signature to a specific person); and
- 3) The electronic signature is carried out under penalty of perjury (which applies only to Medicaid).

### Statutory Background

There are several laws that directly or indirectly impact the use of electronic signatures as they relate to public coverage programs, as well as e-commerce in general:

The [Health Insurance Portability and Accountability Act of 1996 \(HIPAA\)](#) provides federal protections for personal health information and gives individuals an array of rights with respect to that information. Although required by HIPAA, the Department of Health & Human Services (HHS) has yet to adopt standards that specify the procedures for the electronic transmission and authentication of signatures.<sup>5,6</sup> In the absence of specific standards, entities that are required to comply with HIPAA (which include Medicaid and CHIP) must ensure that electronic signatures meet the legal requirements of state law.<sup>7</sup>

The [Government Paperwork Elimination Act of 1998 \(GPEA\)](#) established a deadline of October 2003 for federal agencies to give individuals or entities the option, when practicable, to submit information,

transact business electronically and use electronic signatures.<sup>8</sup> The GPEA establishes the legal effect and validity of electronic signatures or other electronic authentication<sup>9</sup> and §1710 defines “electronic signature” as a “method of signing an electronic message that:

- 1) Identifies and authenticates a particular person as the source of the electronic message; and
- 2) Indicates such person's approval of the information contained in the electronic message.”

The **Uniform Electronic Transactions Act (UETA)**, approved in 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), provides a model for e-commerce that has been enacted by 48 states including the District of Columbia.<sup>10</sup> In the UETA, “electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.<sup>11</sup>

In 2000, the **Electronic Signatures in Global and National Commerce Act (E-SIGN)** gave electronic signatures, contracts and records the same legal validity as paper versions and establishes a definition for electronic signature that is materially the same as UETA.<sup>12</sup> E-SIGN pre-empts state law unless the state has enacted UETA or the state law is both consistent with provisions of E-SIGN and technology-neutral.<sup>13</sup> Notably, E-SIGN expressly excludes “government transactions,” which may add to the lack of clarity around the use of electronic signatures as discussed in the issues section below.

In 2009, the **Children’s Health Insurance Program Reauthorization Act (CHIPRA)** amended §1902 of the Social Security Act to clarify that any signature requirement for an application for medical assistance (which is required by law in Medicaid, but optional in CHIP) may be satisfied through an electronic signature, as defined in the GPEA §1710(1).<sup>14</sup> CHIPRA also allows the use of electronic signatures for families to consent to automatic enrollment in Medicaid or CHIP through express lane eligibility.<sup>15</sup>

### State Use of Electronic Signatures

As of January 1, 2011, according to a survey conducted by the Georgetown Center for Children and Families (CCF) and the Kaiser Commission on Medicaid and the Uninsured, 29 states accept electronic signatures for online applications for Medicaid for

children while 23 of the 38 separate state CHIP programs accept electronic signatures.<sup>16</sup>

Only three state Medicaid programs and four separate CHIP programs with electronically-submitted applications do not use electronic signatures. Given the requirement that Medicaid applications must be signed under penalty of perjury, these states require that the application or other form generated at the end of the application process be printed, signed, and faxed or mailed to the appropriate office. This can result in processing delays and in a higher rate of incomplete applications either because the signature page is not received or not properly matched to the application.

### Issues to Consider

**Federal vs. State Law** - Part of the confusion surrounding electronic signatures likely stems from the interplay between federal and state laws. While CHIPRA points to the GPEA electronic signature provision, CMS in on record stating that electronic signatures are allowed only if permitted by state law and HHS states that in the absence of HIPAA standards, electronic signatures must comply with state law. This connection to state laws without more specificity may confound untangling how the various laws impact electronic signatures in Medicaid and CHIP. The lack of clarity is accentuated by the fact that state law can be superseded by E-SIGN, yet E-SIGN expressly excludes government transactions.

**Multiple Application Methods** - The Affordable Care Act (ACA) envisions a “no wrong door”<sup>17</sup> approach to accessing coverage through Medicaid, CHIP or state Exchanges. The concept of no wrong door applies not only to establishing a single online point of entry for accessing multiple coverage options but also to offering different ways to apply: online, via the telephone, through the mail or in person. These additional paths to coverage point to the need for federal guidance to address electronic signatures associated with different methods of application:

- **Written vs. Electronic Application** - Federal law and regulation expressly require a “written” application for Medicaid.<sup>18</sup> While the various laws cited above give electronic records the same legal standing as written or paper documents, some states may be looking for more explicit guidance on this question.<sup>19</sup>
- **Telephone Applications** - The inclusion of

"sound" in the definition of electronic signatures allows for the acceptance of telephonic applications. At least one state, Wisconsin, electronically records applications made by telephone and attaches the recording to the electronic file to meet the signature requirement.<sup>20</sup>

- **Facilitated Applications** - Experience in Medicaid and CHIP has proven that some families (due to a lack of internet access or literacy, cultural and other barriers) need personalized assistance with online applications. Thus, it is important to consider and clarify the use of electronic signatures when a community-based organization or health care provider facilitates the application process.
- **Application through Mobile Devices** – As technology continues to advance, the flexibility to adapt applications and electronic signatures to smart phones and other mobile devices is needed. Given that certain ethnic groups, such as Latinos and African Americans, are more apt to use cell phones than computers,<sup>21</sup> extending access to mobile devices will be important to meeting coverage goals.
- **Renewal Applications** – It may be helpful for CMS to remind states that signatures are not required by federal regulation at renewal for either Medicaid or CHIP.<sup>22</sup> While signature at renewal remains a state option, streamlining and simplifying requirements generally result in administrative efficiencies. For example, states would not have to provide electronic storage capacity for recorded telephone renewals if the state chooses to not require signatures at renewal.
- **Express Lane Eligibility** – Express lane eligibility allows states to use the eligibility findings from other income-based public benefits to enroll eligible children in Medicaid and CHIP. Such enrollment does not require the completion of an application or a signature, although it does require affirmative consent from the family. Consent can be provided through written or electronic signature, but telephone or verbal consent is also allowed.

**Technology-Neutral Electronic Signatures** - Flexibility in electronic signature definitions permit the use of different electronic signature technologies ranging from a simple click through or check-box type

process (e.g., an "I Agree" button), to a PIN number, to a single string of numeric code that is encrypted, to biometric measurements (such as a retina scan or thumbprint), to a digitized picture of a handwritten signature, or any combination thereof.<sup>23</sup> Any requirement to use a specific technology inhibits the development and application of new technologies that will inevitably emerge as e-commerce matures. For example, requiring a pin pad or device that digitizes a signature for electronic transmission would be cumbersome and likely outdated as technology advances.

**Signature Under Penalty of Perjury** – Medicaid law requires a signature under penalty of perjury<sup>24</sup> that is not required by the ACA for subsidized coverage in the Exchange, or in applying for CHIP. States may wonder how to reconcile these different requirements in instituting a single, web-based application. Considering that the ACA envisions a paperless application process whereby information needed to verify eligibility is obtained from government agencies or other reliable data sources, CMS may want to clarify that the "penalty of perjury" requirement applies only to information provided by the applicant. The precedent for this is established in CHIPRA, which stipulates that the penalty of perjury requirement does not apply to information obtained from an express lane eligibility agency.

## Conclusion

Up-to-date and explicit guidance from CMS is needed for states as they advance the use of technology in administering Medicaid and CHIP, and as states build web portals for their Exchanges. While it is important for CMS to address electronic signature requirements specifically, there are associated issues worthy of clarification at the same time. For example, electronic communications have emerged as the predominant form of correspondence and can result in more-timely and less costly communications between state agencies and beneficiaries. Guidance addressing e-communications, data transmission, record retention, privacy and security go hand-in-hand with helping states untangle the requirements of electronic signatures and in using technology to efficiently and effectively manage public coverage programs.

## Endnotes

1. The Affordable Care Act (ACA), §1943.
2. The ACA authorizes states to create marketplaces called Exchanges, which will allow individuals and small-business owners to pool their purchasing power to negotiate lower rates, compare cost and quality of health plans, and enroll in coverage.
3. Centers for Medicaid and Medicare Services (CMS), "Continuing the Progress: Enrolling and Retaining Low-Income Families and Children in Health Coverage" (August 2001).
4. The citation found on the website of the Aging and Disability Resource Center - Technical Assistance Center ([http://www.adrc-tae.org/tiki-view\\_faq.php?faqId=16&highlight=electronic%20signature](http://www.adrc-tae.org/tiki-view_faq.php?faqId=16&highlight=electronic%20signature)) is consistent with similar statements attributed to CMS staff.
5. Health Insurance Portability and Accountability Act (HIPAA) § 1173(e) Electronic Signature. (1) Standards. – "The Secretary, in coordination with the Secretary of Commerce, shall adopt standards specifying procedures for the electronic transmission and authentication of signatures with respect to the transactions referred to in subsection (a)(1)." HHS released a proposed rule 45 CFR 142, "Security and Electronic Signature Standards" on August 12, 1998, which never became final. Subsequent HIPAA guidance, issued in 45 CFR Parts 160 and 164, focuses on related issues in regard to transmission, privacy and security of electronic data but does not directly address electronic signatures.
6. [http://www.hhs.gov/ocr/privacy/hipaa/faq/business\\_associates/247.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/business_associates/247.html).
7. *ibid.*
8. Office of Budget and Management, OMB Memo M-00-10, "OMB Procedures and Guidance on Implementing the Government Paperwork Elimination Act (GPEA)" (April 25, 2000).
9. Government Paperwork Elimination Act (GPEA), §1707: "Electronic records submitted or maintained in accordance with procedures developed under this title, or electronic signatures or other forms of electronic authentication used in accordance with such procedures, must not be denied legal effect, validity, or enforceability because such records are in electronic form."
10. National Conference of Commissioners on Uniform State Laws (NCCUSL) website. <http://www.nccusl.org/Act.aspx?title=Electronic%20Transactions%20Act>. As of 2010, Washington, Illinois and New York have yet to adopt the UETA although each has state laws dealing with electronic transactions and signatures.
11. The Uniform Electronic Transactions Act (UETA), §106(2)(8).
12. Electronic Signatures in Global and National Commerce Act (E-SIGN), §105(5): Electronic Signature. – The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.
13. The current laws prohibit the requirement of a specific technology, as early digital signature laws required, hence the term "technology-neutral." This was intentional to allow for the ongoing development and application of new technologies.
14. The Children's Health Insurance Program Reauthorization Act (CHIPRA) amended the Social Security Act §1902 by adding subsection (dd). While signatures are required by law for Medicaid, there is no signature requirement for CHIP.
15. Express lane eligibility is a new tool provided by CHIPRA that allows states to use the eligibility findings for other income-based public benefit programs or state tax agencies to enroll eligible children in Medicaid and CHIP. CHIPRA stipulates that an applicant's signature under penalty of perjury shall not apply to any element of eligibility based on information from an express lane eligibility agency. Furthermore, CHIPRA allows for a child determined eligible through an express lane agency to be automatically enrolled if the parent affirmatively consents and the state has provided the parent with specific information detailed in the law. While consent can be provided affirmatively in writing, through electronic signature, or by signature on an express lane agency application, it can also be done by telephone or orally, thus overriding the requirement for any signature.
16. M. Heberlein, et al., "Holding Steady, Looking Ahead: Annual Findings of a 50-State Survey of Eligibility Rules, Enrollment and Renewal Procedures and Cost-Sharing Practices in Medicaid and CHIP, 2010-2011," Kaiser Commission on Medicaid and the Uninsured (January 2011).
17. "No wrong door" is a concept for accessing public benefits that assures eligible individuals are not turned away regardless of where or how they apply. It ends any lingering practice of applying for the "wrong" program and being required to reapply for the "right" program. The concept also recognizes that no one size fits all, opening up the paths to enrollment via different mechanisms: online, over the telephone, via the mail or in person.
18. Social Security Act, §1902.
19. The publication states that computerized or online Medicaid applications are allowed as long as states have safeguards that restrict the use or disclosure of information. It also suggests that states use an automatic encryption process to protect the confidentiality of the information consistent with CMS's internet security policy. Whether this remains the preferred method of security or whether there is flexibility in choosing other safeguarding mechanisms is not clear. Given that issues related to electronic transactions cannot be separated from electronic signatures, broader guidance is needed. *Op.cit.* (3).
20. In a webinar presented by the Maximizing Enrollment for Kids project on September 30, 2010, Jim Jones, Wisconsin Deputy Medicaid Director, noted that Wisconsin has implemented telephonic signatures in compliance with the 2009 Farm Bill §4190, which also requires that a written copy of the application be sent to the household along with a simple process for updating or correcting any information.
21. A. Smith, "Mobile Access 2010," Pew Research Center (July 7, 2010).
22. *Op.cit.* (3).
23. J. Buckley, M. Tank and B. Kolar, "Electronic Signatures and Records Under E-SIGN, UETA and SPeRS," Kolar LLP, 2007.
24. 42 CFR 435.907.

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