E-SIGN Study Comments P004102

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Introduction

General Issues

1. How does the requirement of section 101(c)(1)(C)(ii) of the ESIGN Act, that businesses allow consumers an opportunity to provide consumer consent or confirmation of consent electronically prior to providing consumers electronic versions of information, affect electronic commerce? How will electronic commerce be affected in the future by this requirement?

   iLumin Response:

   Currently, consumer consent can be obtained by any number of methods from a click-through to a consent imbedded within the transaction document that is electronically signed by the consumer. If too many regulations are put on how this consent is obtained, the consent requirement could become very burdensome to both consumers and businesses, thereby slowing the adoption of electronic transactions in commerce.

   Businesses should be allowed to choose from a range of methods to find the form of consent that is best for their business, their transactions, or their customers, based on the risks and the benefits of the method. For example, a brokerage company or a credit card company may choose to have the customer sign a one time consent agreement for the life of the relationship. Or the company may choose to require only a click through consent to conduct each electronic transaction with a supporting audit trail.

   On the other hand, a company involved with individual transactions involving large amounts of money or other consideration, may choose to embed the consent text into each individual document involved in the transaction and then have the consumer digitally sign the document.

   One issue raised by the consent requirement is how to resolve the situation where one party, in a multiple-party transaction, refuses to consent to participate in an electronic transaction, but all other parties have consented. Do all the other parties have to drop the transaction to paper? Who should bear the cost of dropping to paper – the non-consenting party? All parties bearing their share?

   It is important that organizations be given a variety of ways to comply with the consent requirement and that that consent requirement not be too restrictive during this time when the market is determining how they will use and benefit from the world of electronic transactions. A short study of the adoption of "general purpose" credit cards by merchants and consumers provides some insight and guidance into what needs to take place in the electronic transaction world.

   The success of general purpose credit cards was and continues to be dependent on consumer adoption, which is dependent on merchant adoption. One without the other offers a hollow value proposition. The credit card example illustrates that despite a compelling value proposition; full adoption can take decades if merchants do not readily adopt a new instrument.

   Realizing that consumer adoption would be the critical first step in the adoption of general-purpose credit cards, banks simply sent credit cards to consumers in the mail with built-in credit (no credit applications or restrictive credit approval processes or requirements). Though this system had a higher risk factor than if restrictive approval and consent processes would have been used, it did ensure customer adoption and allowed general-purpose credit cards to achieve consumer ubiquity, near-universal acceptance among merchants, and a catalyst in new forms of commerce.

Electronic transactions face a similar road. They require adoption by consumers and adoption by the merchants in whatever form they take in a transaction. Consent to participate represents a potential barrier if restrictions are too intense.

2. What statutory changes, if any, should be made to the ESIGN Act to assist businesses and consumers in domestic and/or international business markets in implementing and adapting to the consumer consent and consent confirmation provisions under section 101(c)(1)(C)(ii) of the Act?

iLumin Response:

Under section 101(c)(1)(B)(i), one change might be to indicate that the clear and conspicuous statement should include the consequences of an individual withdrawing consent in a multiparty transaction. For example, notifying the individual refusing/withdrawing consent that he will bear the cost for all parties for the transaction to occur on paper, or bear the differences in the cost between the transaction occurring electronically or on paper, or that each party will bear their own costs.

Additionally, a section could be added prohibiting a person from withdrawing consent once it is given to a multiple-party transaction because of the reliance of all the other parties to the transaction. Notice of the prohibition would also likely be needed in the clear and conspicuous statement in section 101(c)(1)(B)(i).

3. What, if any, are the benefits and burdens to consumers and electronic commerce resulting from the affirmative consent provisions in the statute? Do any such benefits outweigh any burdens?

iLumin Response:

No method of consent is specified currently in section 101(c)(1)(C)(ii). One burden mentioned above is the burden upon parties in a multiple-party transaction when one party refuses to or withdraws consent. Also as mentioned if the consent requirements are such that they provide a significant departure from an online transaction or process, then that departure would impact continuance of the transaction and could cause undue burden and impact adoption generally.

The benefits of the consent requirement accrue to both the consumers and the business using electronic transactions. If the consumer gives consent, it is after having received the statement of the consumer's rights required by section 101(c)(1)(B)(i). Additionally, by requiring that the consent be given "in a manner that reasonably demonstrates that the consumer can access information in the electronic form used to provide the information that is the subject of the consent," the consumer can be assured that they are not consenting to terms or a document that they cannot access.

The benefits to the business employee of electronic transactions include the ability to counter any argument that the consumer did not consent or could not access the electronic transaction by showing in some document-able manner that the consumer did affirmatively consent after having received notice of the consumer's rights. The documentation of consent could include, but not be limited to, an audit trail of the consumer's click-through consent, a document of consent that has been electronically signed in some manner attributable to the consumer, or by an digital signature upon the transaction document which contains embedded consent language. See Appendix A Matrix and additional documentation on consent options and impacts. The statute doesn't require a digitally signed consent.

Such a requirement would certainly place a heavier burden on businesses than what is required in the statute currently. To avoid losing a lawsuit, businesses may choose to employ an audit trail or require consent with a digital signature if the information the business wants to distribute electronically is highly sensitive or critical, but the Act should leave the level of proof of identity up to the business.

4. What, if any, improvements or changes should Congress make to the statutory language of section 101(c)(1)(C)(ii)?

   iLumin Response:

   Overall the section is very appropriate. It is already quite flexible in that it doesn't require 1) consent "before" distribution of the information, 2) paper-based consent, or 3) consent signed by a more sure electronic method (e.g., digital signature). I would recommend that the requirement not be made more restrictive.

5. Are there any additional issues that should be considered during this study?

   iLumin Response:

   How to resolve the issue where one party refuses to consent in a multiple-party transaction but all the other parties consent. Do all the other parties have to drop the transaction to paper? Who should bear the cost of dropping to paper – the non-consenting party? All parties bearing their share?

Business Issues

1. If your business provides information electronically to consumers that is required by law to be in writing, do you request that consumers provide electronic consent or confirm their consent before the electronic information is transmitted?

   iLumin Response:

   Organizations that implement an iLumin system are doing so to replace manual paper processes with automated electronic transaction technology. In some cases the processes our technology automates have been in the past required by law to be in writing. In these cases, electronic consumer consent can be obtained prior to the transmission or transaction of information through a variety of methods based on the unique needs of the transaction.

2. Describe in detail the method used to obtain electronic consumer consent.

   iLumin Response:

   Currently, consumer consent can be obtained by any number of methods from a click-through to a consent imbedded within the transaction document that is electronically signed by the consumer.

   We recommend that businesses choose a method of consent that is best for their business based on the risks and the benefits of the method and the burden they believe their customers will bear. For example, a brokerage company or a credit card company may choose to have the customer provide consent one time for the life of the relationship at the time they establish their login account. Or the company may choose to require a click through consent to conduct each electronic transaction with a supporting audit trail.

   On the other hand, a company deploying a technology to handle high value electronic transactions involving monetary or other consideration, may choose to embed the consent text into each individual document involved in the transaction or to have a separate consent document that is required to be electronically signed before the transaction may continue.

3. If you allow consumers to provide electronic consent to receive legally-required information electronically, please explain whether the electronic consent practice of your business is a result of section 101(c)(1)(C)(ii) of the ESIGN Act. Explain any other legal basis for this practice.

   iLumin Response:

   Our software notifies individuals using industry standard e-mail when they have information to review or sign. Therefore, companies employing our software would likely provide consumers with information either by e-mail or in a signing room that they are requested by e-mail to enter (via their web browser).

4. For what types of transactions do you seek electronic consumer consent or confirmation prior to sending information electronically that is required by law to be sent to consumers in writing?

   iLumin Response:

   The iLumin solution does not limit the types of transactions that can be performed electronically. Methods of receiving consent in prior to transactions, or at points within the transaction are easily programmed and implemented. Whether the iLumin system is implemented for internal business transactions, such as expense reports, employee agreements, or request forms, or whether the transactions being automated with the iLumin system are more consumer and business to business related, such as loan applications, promissory notes, contracts or non-disclosure agreements, consent can be easily modified to meet consent requirements.

5. Provide an estimate of the percentage of business transactions you conduct per month that requires the production of legally required information to consumers in written form.

   iLumin Response:

   N/A

6. Does your business incur additional costs directly related to providing customers with the option of electronically consenting to or confirming the consent to receive information electronically, whether or not you provide the information pursuant to § 101(c)(1)(C)(ii)?

   iLumin Response:

   N/A

7. Are there burdens associated with providing information electronically to consumers that is required by law to be provided to them in written form? Are there burdens associated with allowing consumers to provide electronic consent or confirmation of consent prior to receiving the electronic information from your business pursuant to § 101(c)(1)(C)(ii)?

   iLumin Response:

   If too many regulations are put on how this consent is obtained or if confirmation of the consent is required, the consent requirement could become very burdensome to both consumers and businesses, thereby slowing the adoption of electronic transactions in commerce. However, the current requirements stated in ESIGN are broad enough to provide unburdened fulfillment of the statutory requirement to obtain consent.

8. Explain any economies or benefits to your business resulting from the distribution of information electronically to consumers (e.g. storage, administrative processing), whether or not the information is provided pursuant to § 101(c)(1)(C)(ii). Are there economies or benefits related to allowing customers to provide electronic consent or confirmation of consent prior to receiving electronic information as required by ESIGN?

iLumin Response:

Our customers realize tremendous cost savings from moving paper-based processes to electronic-based transactions. Cost savings on a typical consumer transaction such as a mortgage close can be reduced substantially. There are no specific benefits to receiving electronic consent separately from the transaction in our current process.

9. Do the benefits of providing electronic versions of information that is legally required to be provided in writing outweigh the burdens of allowing consumers an opportunity to provide electronic consent or confirmation of consent in order to receive the information?

iLumin Response:

It is extremely beneficial to the company to provide information electronically. The added burden to gain consent does deter some consumers from participating electronically who are uncomfortable or misinformed about what their consent is committing them to. This reaction is based on the level of trust a consumer has with an organization or the perceived benefit from providing consent. Consumer concern can be reduced for the most part by increasing the amount of information provided to the consumer at the time consent is sought.

10. Describe any feedback you have received from consumers or employees regarding the electronic consumer consent or confirmation procedures your business employs, also specifying whether the procedures are those required by ESIGN or were in place prior to ESIGN.

iLumin Response:

E-SIGN is viewed as a good first attempt as enabling legislation, however there are not enough details to clarify for our customers just how a) they can ensure compliance and b) how our product provides for compliance. The range of interpretation is great. As we have sought to implement an ESIGN-compliant solution, we have identified a number of areas where sufficient clarification or guidance does not exist.

For example:

a. The process for marking a transferable record that is no longer transferable (i.e., Satisfied note). Our approach to this has been to identify the record as "Satisfied" and no longer transferable. There is no guidance as to how long a "Satisfied" document should remain electronically or how to move it to paper.

b. How to resolve the issue where one party refuses to consent in a multiple-party transaction but all the other parties consent. Do all the other parties have to drop the transaction to paper? Who should bear the cost of dropping to paper – the non-consenting party? All parties bearing their share?

c. Retention periods for electronic documents.

d. The process for restoring an authoritative electronic document in the event of a system failure or file corruption.

11. Describe the methods your business uses to verify:

    - that a consumer's consent or confirmation demonstrates the consumer's ability to access the requested information; and
    - that the electronic consents and confirmations are provided by the customers entitled to and intended to receive the electronic information.

    iLumin Response:

    Consent is received at the location where the electronic transaction is taking place. The consent and transaction events both take place using the same process (i.e., the browser). Once a consumer creates a login account, that login account provides the access to receive electronic information consented to. Our product allows for higher levels of consumer identification up to and including a digital certificate, biometrics, or other methods.

12. What method, if any, in addition to the consent procedure in section 101(c)(1)(C)(ii) of the ESIGN Act could be employed to prevent consumer fraud? Would consumer fraud increase in the absence of the consent procedure of section 101(c)(1)(C)(ii)?

    iLumin Response:

    Our product allows for higher levels of consumer identification up to and including a digital certificate, biometrics, or other methods.

    Consumer fraud does have the potential to increase in the absence of the consent procedure. Consent not only protects the consumer, but also the company participating in the transaction.

13. With regard to international business transactions, explain whether your company requests electronic consumer consent or consent confirmation prior to sending information electronically that is required to be provided to the consumer in written form. If so, explain if the method has had positive or negative consequences in international commerce.

    N/A

14. If your business does not provide consumers the opportunity to receive information electronically by sending an electronic consent or consent confirmation, explain why your business does not provide this opportunity. Discuss any implementation problems.

    iLumin Response:

    Our approach does not rely upon the sending and receiving electronic consent via processes such as email. Consent is obtained in the same environment where the transaction will occur (most likely a website accessible by a web browser, or other kiosk station at a place of business).

Technology Issues

1. Are software programs that enable consumers to provide electronic consent or consent confirmation to companies readily available? Describe.

    iLumin Response:

The iLumin solution is Web based so the consumer utilizing a web browser and coming to a web server obtains consent. Any web browser will work so they are readily available. In addition, the iLumin solution utilizes standard email systems for notifications. These notifications must be set up by the implementing organization, but they do not require new or proprietary systems for notification of consent or otherwise.

2. What technology or methods are available that would enable companies to verify that electronic consent or consent confirmation is transmitted by the specific persons entitled to receive electronic information?

iLumin Response:

Authentication of the user is common method of verifying that consent was obtained or transmitted by entitled persons. In the iLumin solution authentication can scale to meet the risk tolerance of the implementing organization, therefore allowing the organization to choose the type of authentication (pin, password, token or other method) that is required to entire the system. In addition, the iLumin solution does not require the transmission of the consent, but rather obtains that consent through a process embedded in a web site. Finally, the iLumin solution utilizes XML to create documents, which enable documents to be tags in ways that allow information to be filtered based upon a user and a user's roles. This again serves to ensure that the entitled persons and only the entitled persons have access to information contained in a consent process or to information within a document concerning consent.

3. Please explain whether additional technology is necessary to accomplish either the electronic consumer consent or company verification methods discussed in Questions 25 and 26, above.

iLumin Response:

No additional technology is needed to handle the requirement that consent be tied to the person who is purported to offer it.

4. Does the development of newer technologies impact the implementation of the consumer consent and consent confirmation provisions of section 101(c)(1)(C)(ii) of the ESIGN Act? If so, how.

iLumin Response:

Voice activated systems may change the way in which we give consent and phone based certificates (M-Certs) may change to way in which we interact with some systems. However, the basic provisions of E-SIGN will not be affected by these developments.

Appendix A –

Consent notification can be placed in a number of places. The key difference in these places is whether the notification can be guaranteed. Having the system place the notification in the electronic transaction itself, or via dialog boxes at the time of signing ensures that the notification takes place. In other words, we do not have to rely on VARs and integrators to provide the proper notification. On the other hand, placing the notification in the registration page, the login page, the user's home page, or in a separate portion of the web page used to display the Online Signing Room (OSR) is up to VARs and integrators – the iLumin solution itself cannot ensure that the proper notification is there.

Placing the notification in different places also provides different levels of legal enforceability. If the notification is in the electronic transaction itself, then it is electronically/digitally signed across by the signing parties, and thus benefits from the integrity, authentication, and non-repudiation of digital signature technology. However, notification in the electronic transaction is not as "conspicuous" as notification and specific prompts in dialog boxes. Notification in dialog boxes is conspicuous, but does not become a physical part of the electronic transaction and its integrity, authentication, and non-repudiation.

Summary of Options

Explanation of Table

Meets E-SIGN requirements for consent

- Believed to be compliant with the requirements stated in E-SIGN and other uniform acts.

Physically apart of the electronic transaction

- The notice becomes part of the electronic transaction; the user signs across the notice along with the rest of the document.

Functionality provided by the product itself

- The solution itself provides the notice.
- VARs/Integrators cannot disable.

Functionality provided by integrator

- The notice is not provided by the solution itself, but is instead provided by the VARs/Integrators.
- Technology providers could not be sure that the notice is being provided to the end users. Implementation is left to the direction of the implementing organization and implemented via VARs/Integrators.

Avoids undue burden integration efforts

- The implementation is not expected to interfere with the way in which VARs/Integrators develop web pages that front the web-based solution.

Avoids undue burden to end-users

- The implementation is not expected to get in the users' way when signing a document.

Option	Meets E-SIGN	Physically apart of the electronic transaction	Functionality provided by the product itself	Functionality provided by integrator	Avoids undue burden integration efforts	Avoids undue burden to end-users
Notice Added to Document Header	Yes	Yes	Yes	Not necessary	Maybe*	Maybe*
Notice Added at Signature Line	Yes	Yes	Yes	Not necessary	Maybe*	Maybe*
Combination of Header and Signature Line	Yes	Yes	Yes	Not necessary	Maybe*	Maybe*
Notice in Dialog Box	Maybe	No	Yes	Not necessary	No	No
Notice in a Frame or Panel	Maybe	No	No	Yes	No	Yes
Notice at Registration	No	No	No	Yes	No	Yes
Notice with Prompts at Login	No	No	No	Yes	No	No
Notice with Prompts on User Home Page	No	No	No	Yes	No	No
Notice in a Separate Document	Yes	No	No	Yes	Yes	Yes

* Depends on the length of the notice.

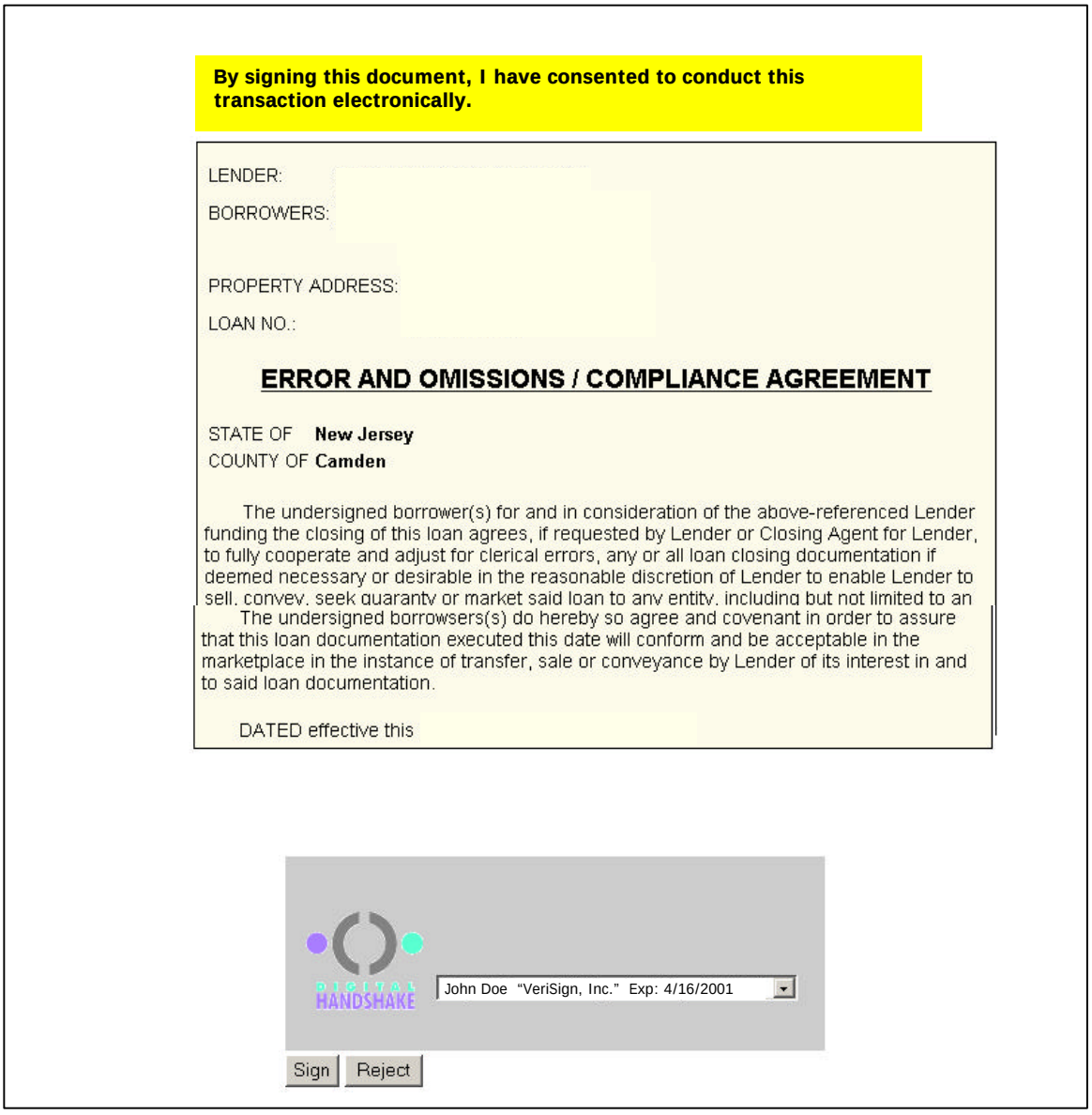
Examples of Option Implementations

The following examples illustration how options presented in the "Summary of Options" table would be implemented. These examples are specific to how the options would be implemented using the iLumin solution Digital Handshake (DHS).

Example 1: Notice Added to Document Header

In this example the document submitted to the DHS system would be pre-pended with the full notice and is a physical part of the electronic transaction itself. As the document is electronically / digitally signed the consent along with other sections of the document is hashed, protected from alteration without detection, and tied to the individual signing the document. An implementation of this nature eliminates dependencies on VARs or integration partners, implementing the DHS system, to construct a compliant process that obtains consent and verifies that the consent was obtained and confirmed by the entitled parties.

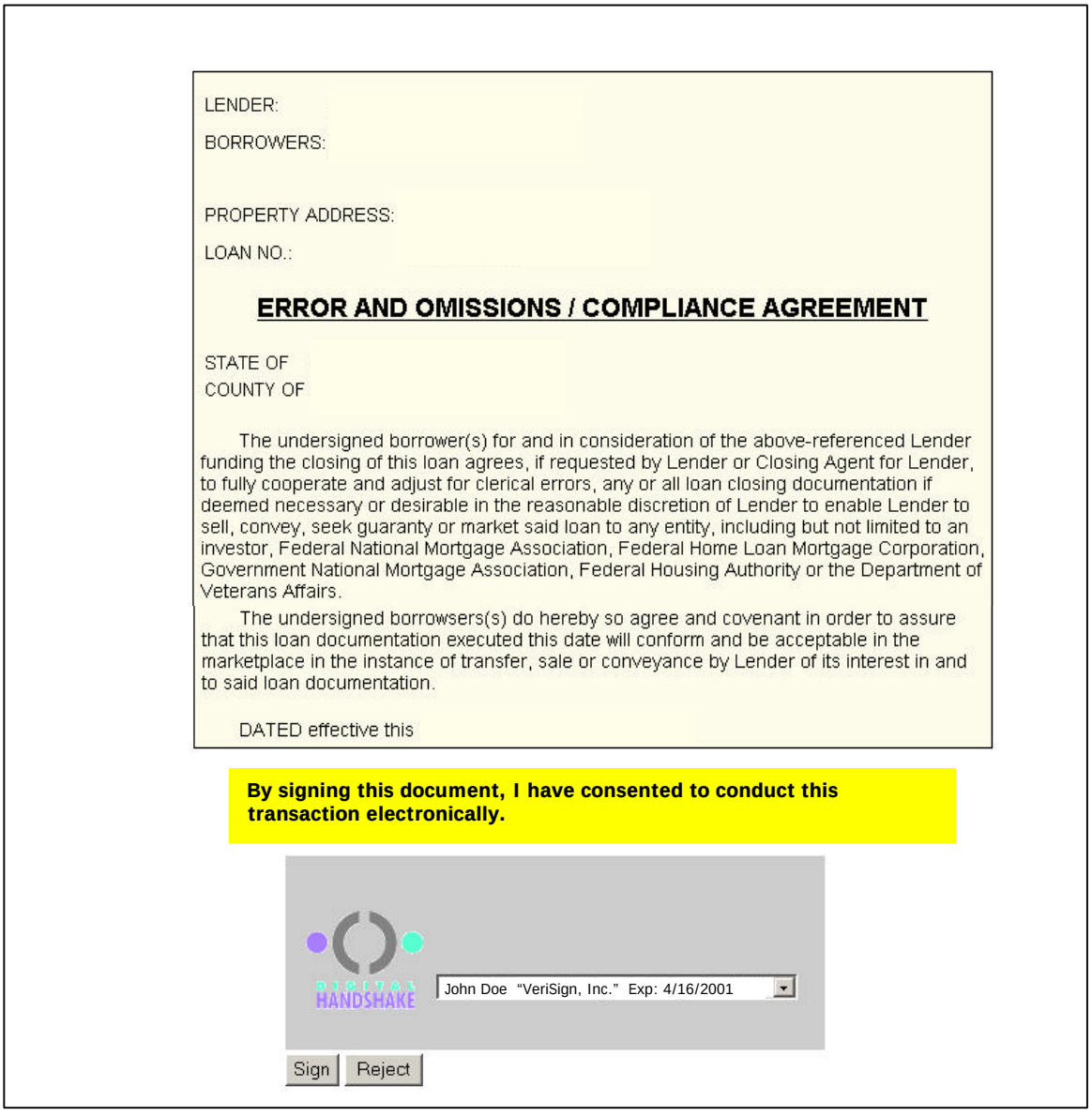
Figure 1: Document with notice in the header



Example 2: Notice Added at Signature Line

In this example the document submitted to the DHS system is be created such that the full notice appears before each electronic/digital signature line. Like the previous example, as the document is electronically / digitally signed the consent along with other sections of the document is hashed, protected from alteration without detection, and tied to the individual signing the document. An implementation of this nature eliminates dependencies on VARs or integration partners, implementing the DHS system, to construct a compliant process that obtains consent and verifies that the consent was obtained and confirmed by the entitled parties.

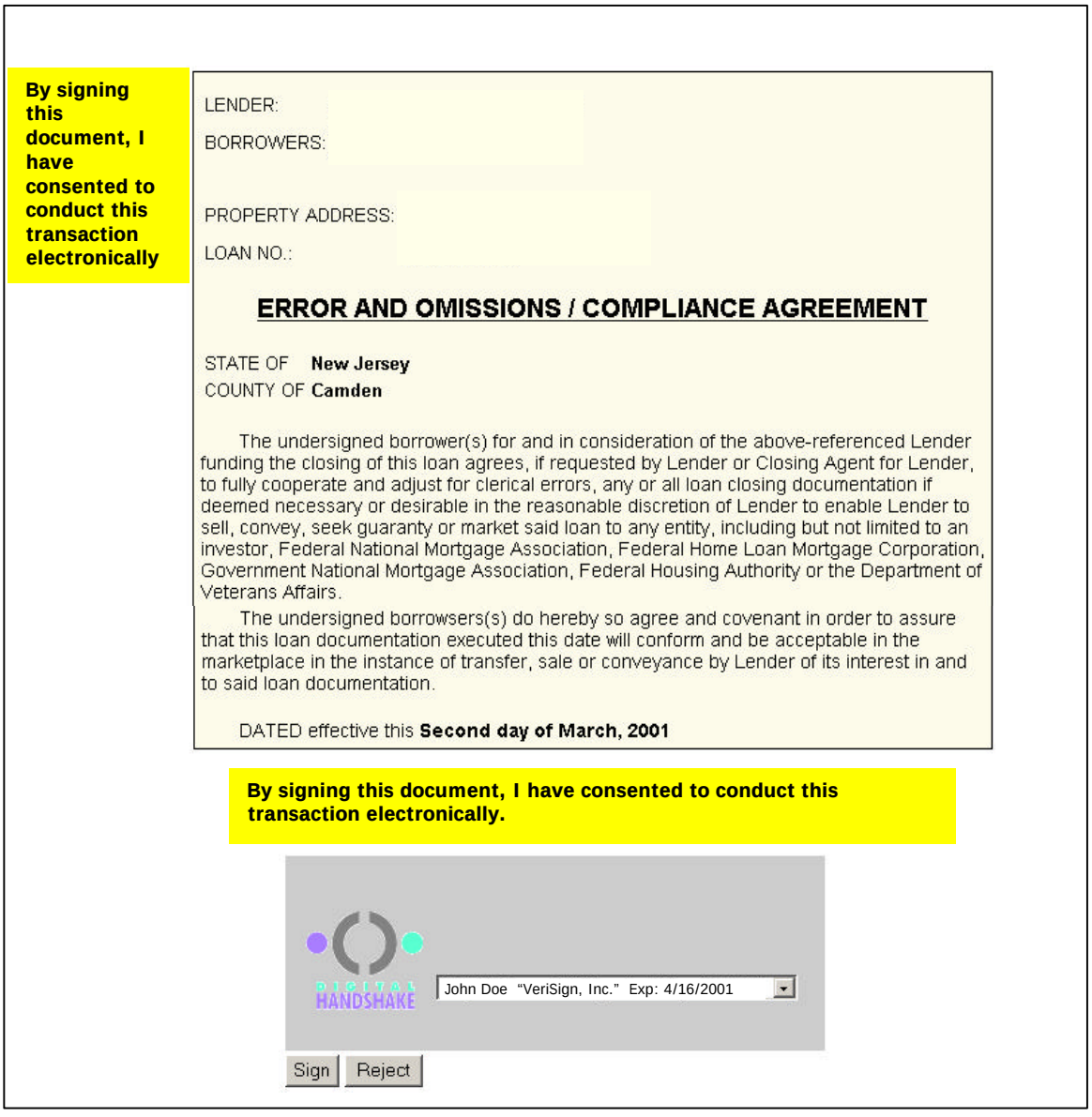
Figure 2: Document with notice at signature line



Example 3: Combination of Header and Signature Line

In this example the full notice is added to the beginning of document and an abbreviated notice is added to document just prior to each signature line. This combination of the two previous examples displays ensures that the entitled parties signing the document have ample opportunity to read the notice prior to signing. In addition, like the two previous example, as the document is electronically / digitally signed the consent along with other sections of the document is hashed, protected from alteration without detection, and tied to the individual signing the document. An implementation of this nature eliminates dependencies on VARs or integration partners, implementing the DHS system, to construct a compliant process that obtains consent and verifies that the consent was obtained and confirmed by the entitled parties.

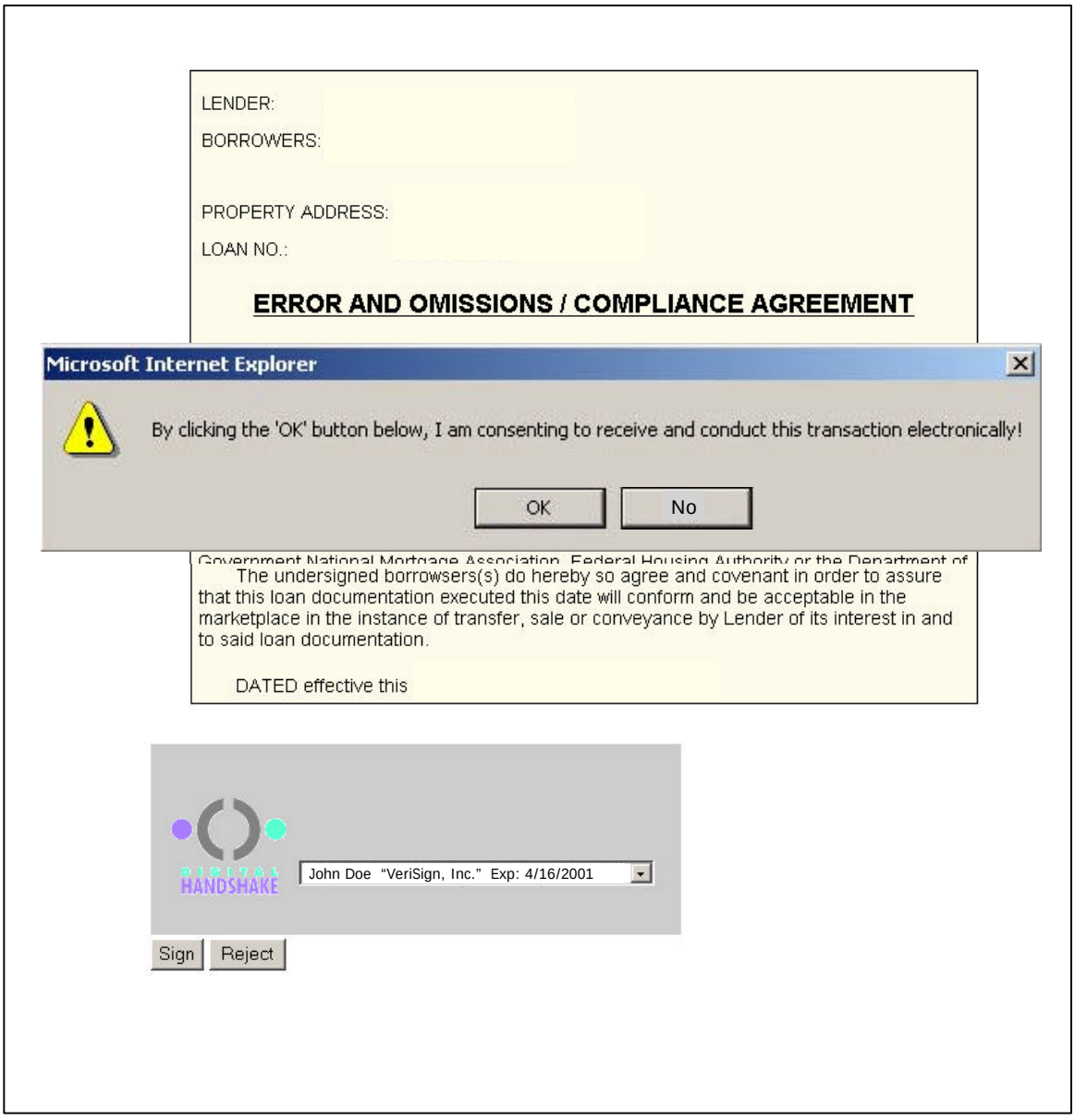
Figure 3: Document with Notice in header and at signature line



Example 4: Notice in a Dialog Box

In this example a dialog prompt, containing the notice, is presented to each user at time of signing. When a document is prepared for signing the signature applet, used by DHS to signing documents, would display the notice to the user and asking them for their acceptance prior to each time the user chooses to sign the document. Through an audit trail, which captures a history of all the actions performed on a document prior to and including signature, the acceptance of this notice could be documented and associated with the user. However, this implementation does not facilitate the notice being a physical part of the document. Like the other examples, An implementation of this nature eliminates dependencies on VARs or integration partners, implementing the DHS system, to construct a compliant process that obtains consent and verifies that the consent was obtained and confirmed by the entitled parties.

Figure 4: Document with notice in a dialog box



Example 5: Notice in a Frame or Panel

In this example the VARs or integration partner would be responsible for placing the notice somewhere on the web page alongside the document, but not as part of the document itself. This implementation does not provide any assurance or verification that the entitled parties have confirmed the notice. In addition, because there is not action that must be performed by an entitled party to confirm the notice, like in example 4 “Notice in Dialog Box”, an audit trial of the transaction would not be able to provide proof of confirmation. Although implementation does eliminate any burden on the end-user to perform an action on the notice, it does place some burden on the integration partner to build the frame or panel as well as unnecessary burden of proof on the implementing organization.

Figure 5.1: Document with notice in a frame or panel (top)

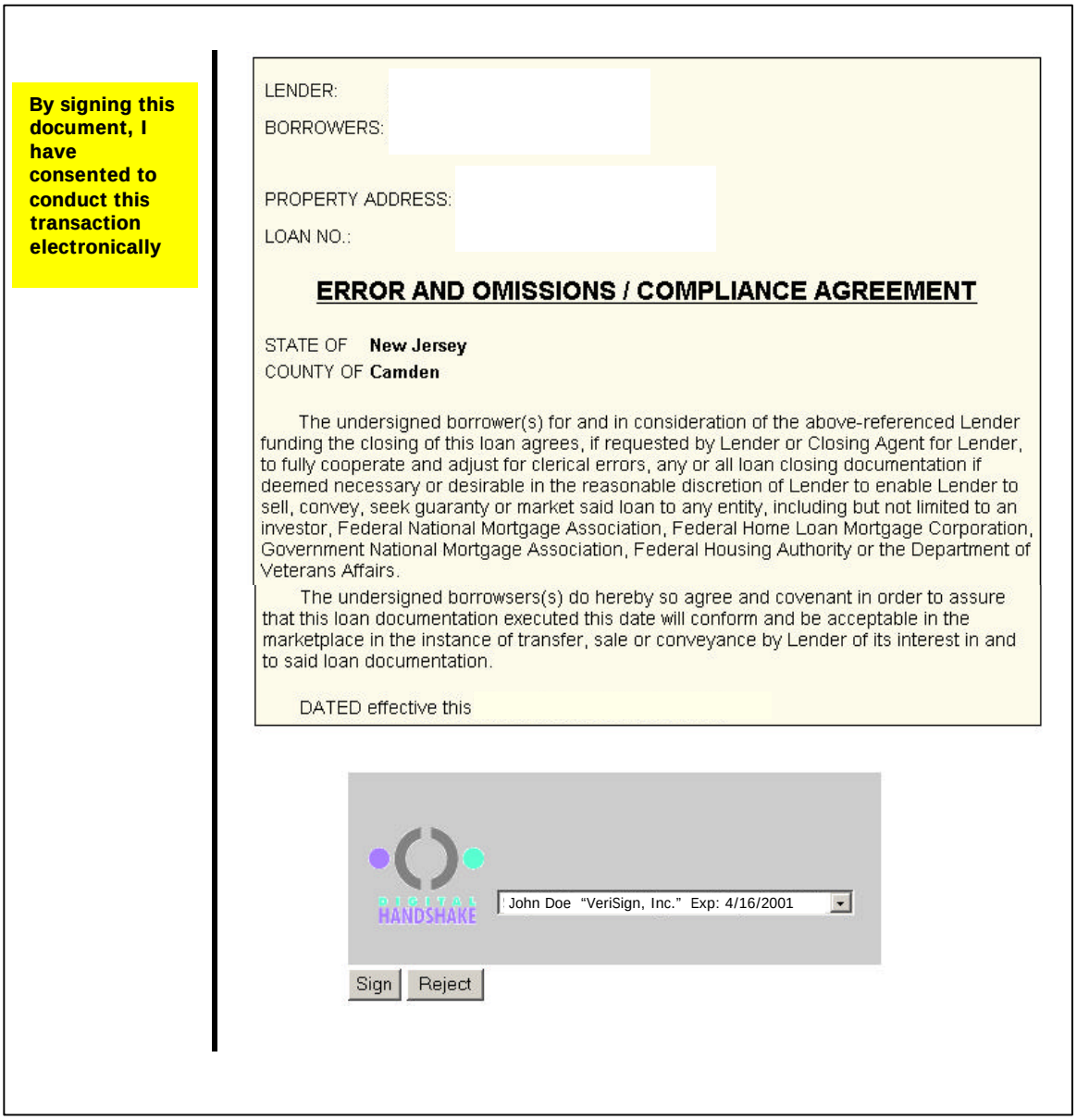
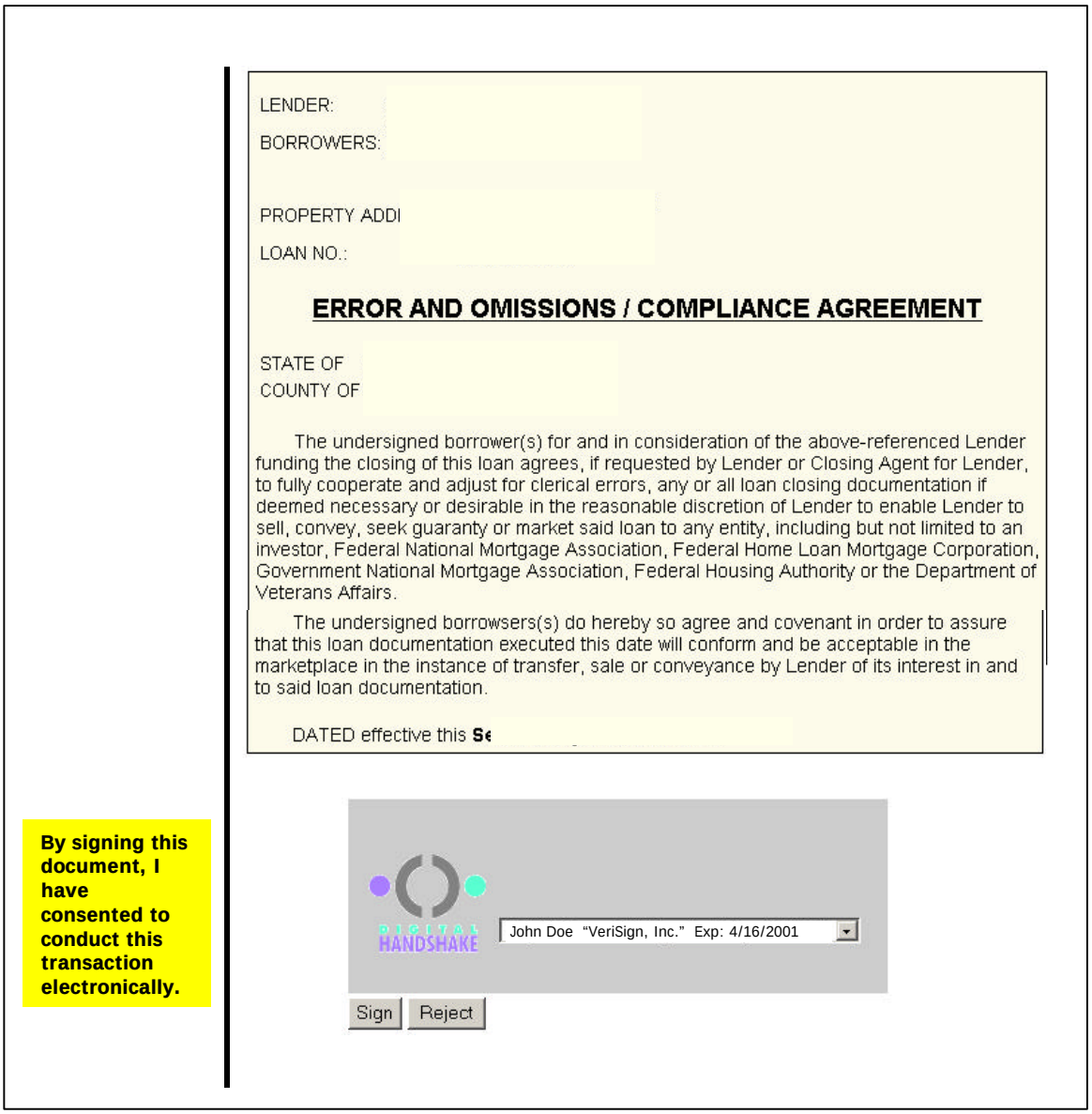


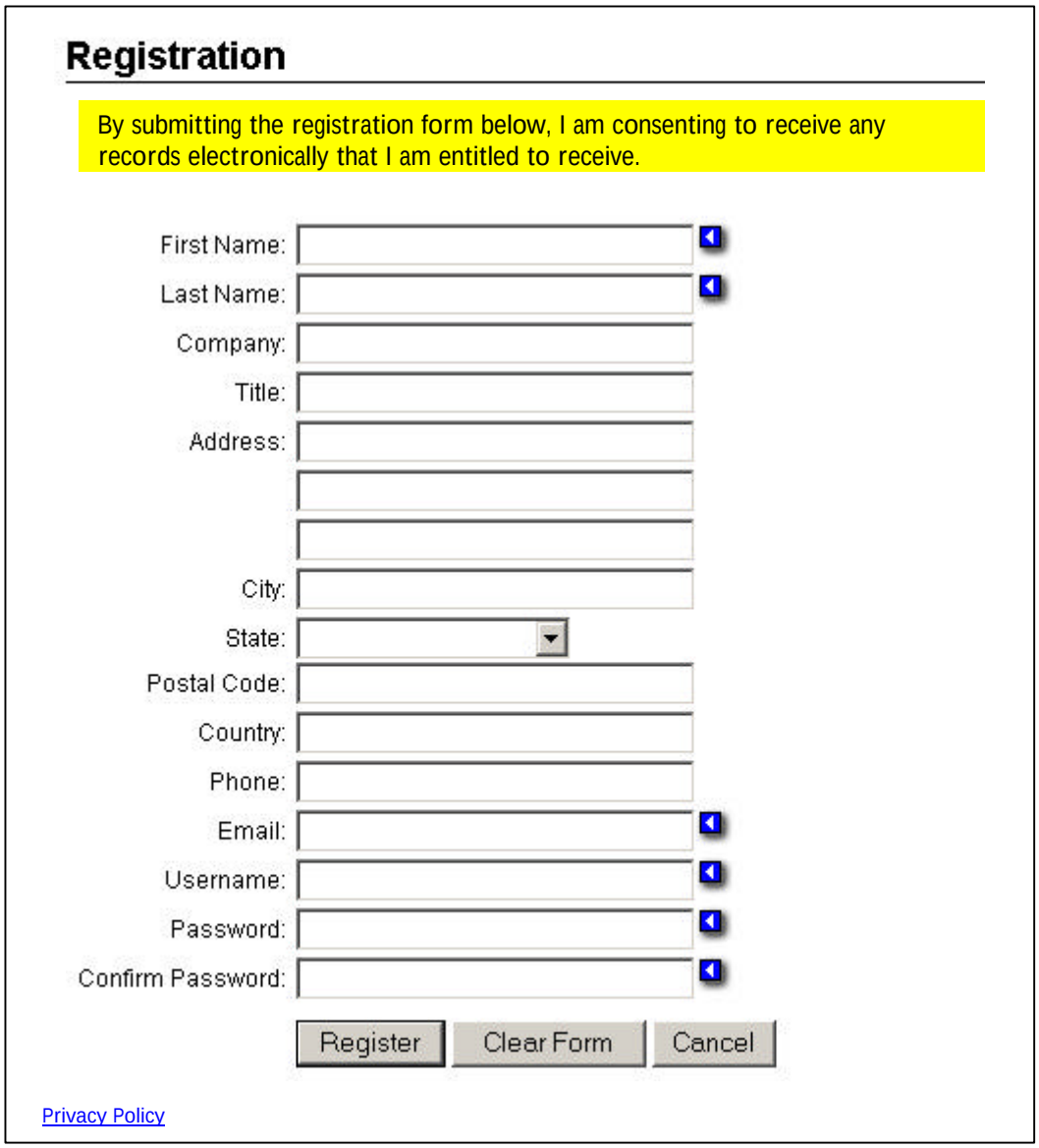
Figure 5.2: Document with notice in frame or panel (bottom)



Example 6: Notice at registration

In this example the notice appears at the time the user registers with the system and consent to participate is obtained for all transactions performed by the user in the system. No notice is attached to a specific document or related to specific transactions and there is no permanent record of notice being confirmed.

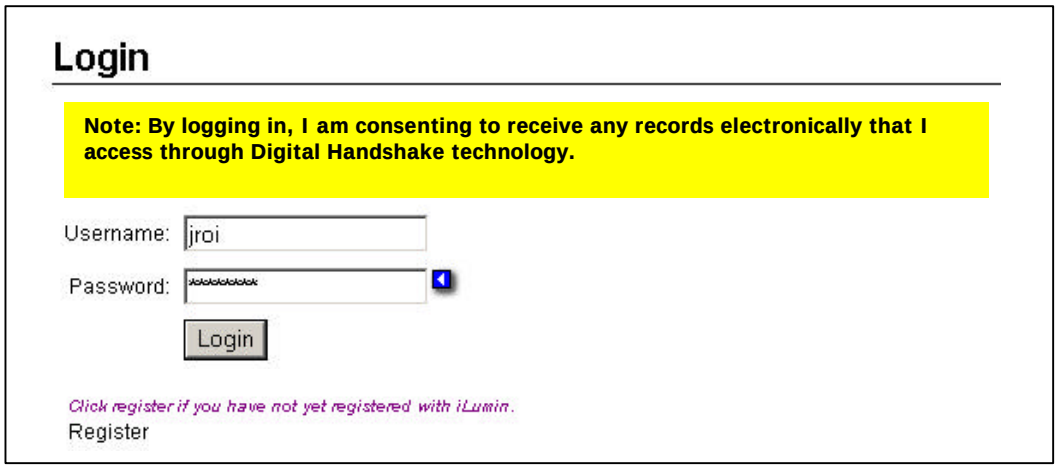
Figure 6: Notice in registration page



Example 7: Notice with prompts at login

In this example, the notice and prompts for acceptance would appear on the login page each time the user logs in to the system. Again, no notice is attached to a specific document or related to specific transactions and there is no permanent record of notice being confirmed.

Figure 7: Login page with notice



Example 8: Notice with prompts on user home page

In this example the notice and prompts for acceptance appear on the user's DHS home page. This home page appears after the user has logged in, but before documents or transactions are accessed. Like the other examples does not create a permanent record of the notice confirmation.

Figure 8: User home page with notice

Example 9: Notice in a Separate Document

In this example the notice is represented as a separate stand-alone document, which must be signed before any of the other documents could be signed. This implementation adds one step to the transaction process, but does create a permanent record that relates to a give transaction.

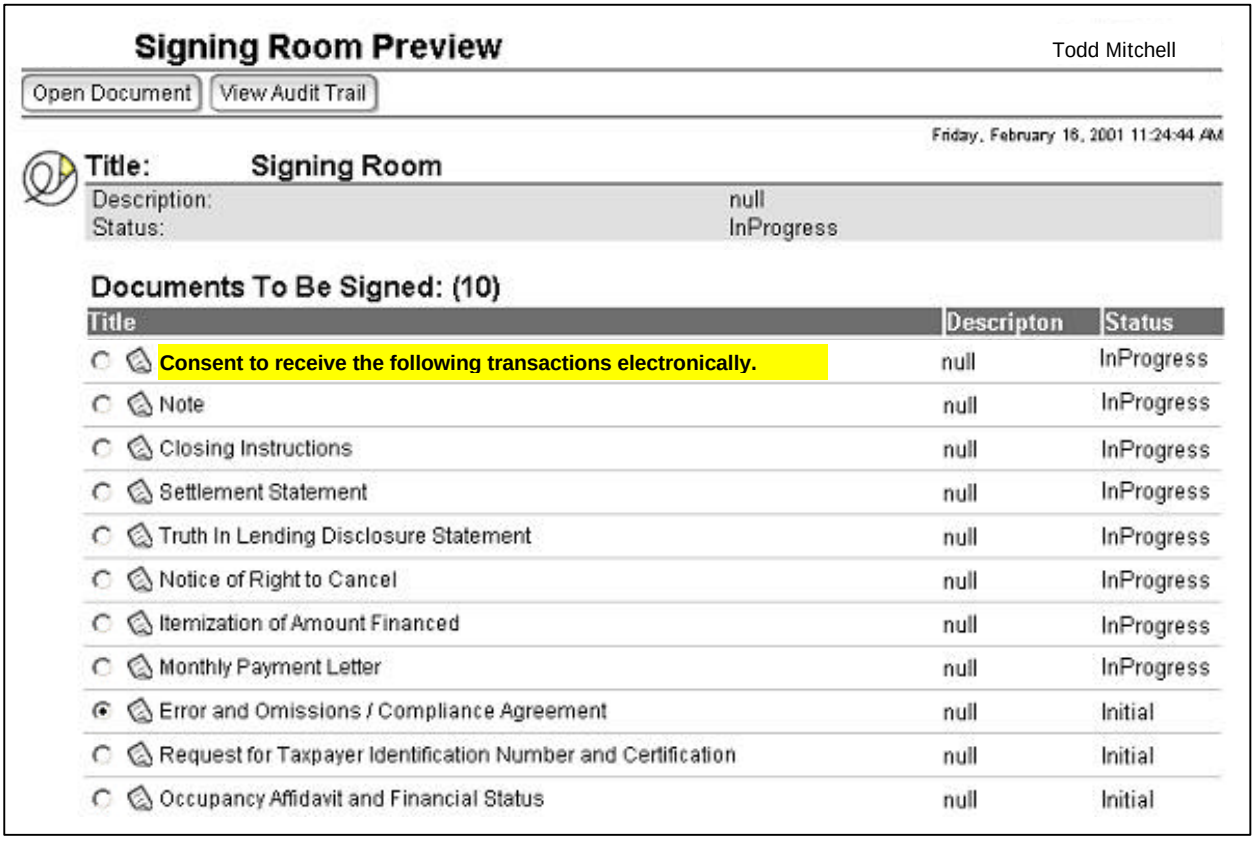



Figure 9: Document list with notice document