



Evaluating and Selecting Electronic Signature Technologies

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The New Esignature Laws

- ♦ The Uniform State Law Solution – the Uniform Electronic Transactions Act (UETA)
- ♦ The Federal Solution – the Electronic Signatures in Global and National Commerce Act (ESIGN)

Overlay statutes

Authorize replacing writings with electronic records

Authorize electronic signatures

Require affirmative “opt-in” by parties -- but opt-in may be shown by surrounding circumstances



The UETA

- ♦ The state law solution for electronic documents and signatures – the Uniform Electronic Transactions Act

Created by NCCUSL

Promulgated in July of 1999

Currently adopted by 37 states and the District of Columbia



The Federal ESIGN Act

- ◆ Problems with the UETA

- Must be adopted by each state

- Process can take years

- States add non-uniform provisions or opt for unique statutes like NYESRA

- California and Iowa

- Doesn't change federal law

- ◆ Federal Reserve
 - ◆ HUD

The Federal E-SIGN Act

- ◆ A federal solution -- the Electronic Signatures In Global and National Commerce Act

Covers state and federal law

Instant 50 state baseline uniformity

Adopted in 1999, signed into law by President Clinton

Provides

Sets

- ◆ requires electronic records and signatures to be as reliable as their paper counterparts
- ◆ Permits rules guiding use of electronic records and signatures in regulator's substantive jurisdiction (no paper, technology neutral)
- ◆ State regulators may disagree over boundaries



Scope of the UETA and ESIGN

♦ Scope

Applies to the use of electronic records and signatures in virtually any commercial transaction, unless specifically excluded

- ♦ UETA applies to state law
- ♦ ESIGN applies to state and federal law

Primary exclusions:

- ♦ Wills, codicils and testamentary trusts
- ♦ Funds transfers (covered by UCC Article 4A)
- ♦ Letters of Credit (Covered by Revised UCC Article 5)
- ♦ Securities (covered by UCC Revised Article 8)
- ♦ Security interests in goods and intangibles (covered by UCC Revised Article 9) Software licensing laws (if State has adopted UCITA)
- ♦ Most laws concerning checks



Scope of the UETA and ESIGN

♦ Scope

Included are:

- ♦ Consumer protection laws
- ♦ Laws governing real estate transactions (subject to special rules concerning documents to be filed of record)
- ♦ Laws of agency
- ♦ Laws covering powers of attorney
- ♦ Laws requiring notarization of documents
- ♦ Laws governing trusts (except testamentary trusts)
- ♦ Laws concerning the submission of documents to, or issuance of documents by, government authorities (subject to special rules)



Structure of the UETA and ESIGN

- ◆ Three pronged approach

 - Flexible definition of “record” to replace writings

 - Permissive definition of signature

 - Flexible rules to address the hard cases



Three Pillars of the UETA and ESIGN

- ◆ A record or signature may not be denied legal effect or enforceability solely because it is in electronic form
- ◆ If a law requires a record to be in writing, an electronic record satisfies the law
- ◆ If a law requires a signature, an electronic signature satisfies the law



Electronic Signatures Under the UETA and ESIGN

- ◆ Definition of signature

“Electronic Signature” means an electronic identifying sound, symbol, or process attached to or logically connected with an electronic record and executed or adopted by a person with present intention to authenticate a record



Electronic Signatures Under the UETA and ESIGN

♦ Includes

typed names

a click-through on a software program's dialog box combined with some other identification procedure

Personal Identification Numbers

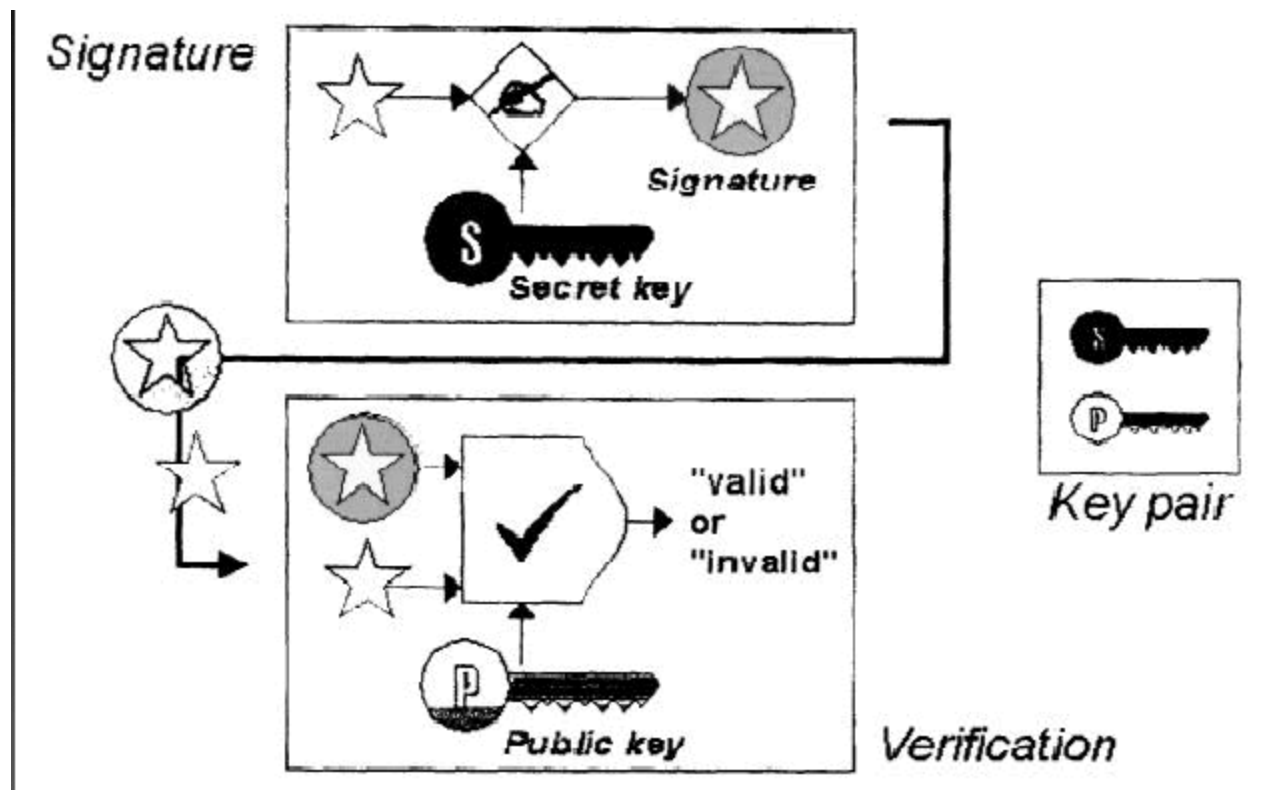
biometric measurements

a digitized picture of a handwritten signature

Use of SecureID™ or Defender™ number generators

a complex, encrypted authentication system

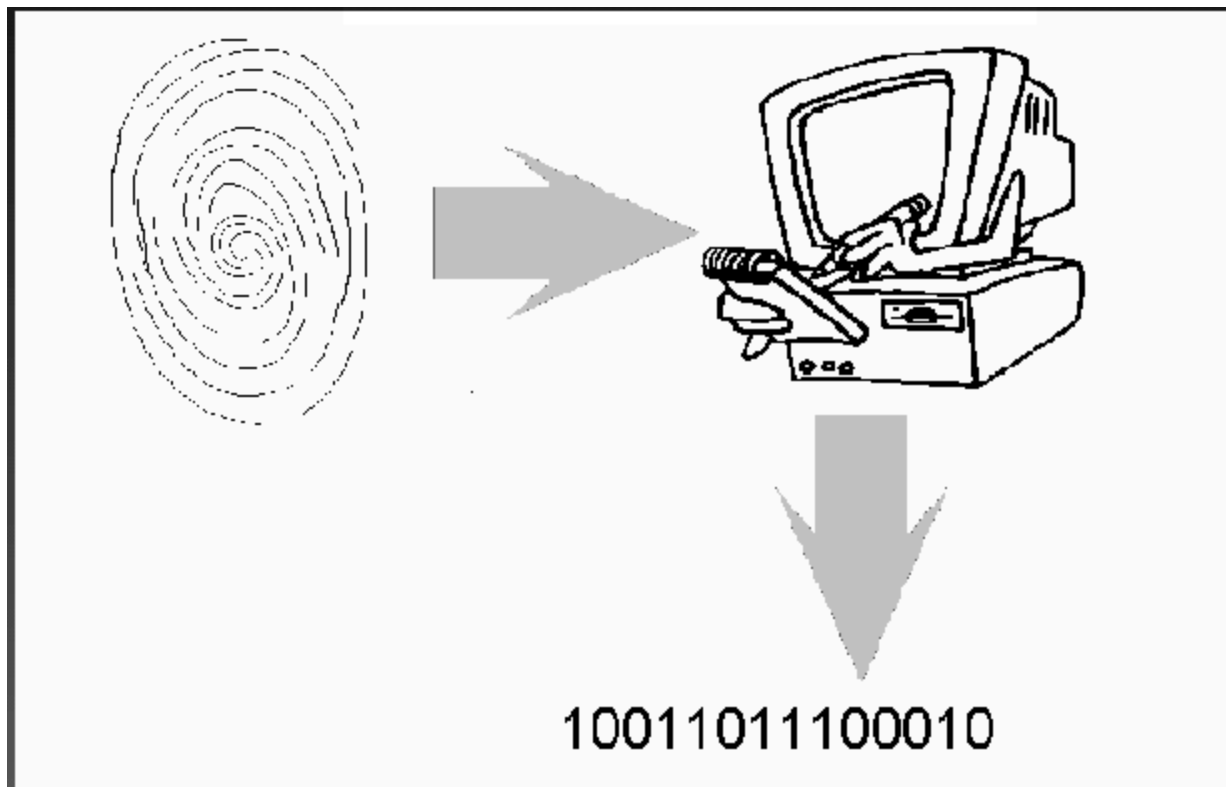
Review of Legal Barriers to Electronic Documents



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Review of Legal Barriers to Electronic Documents



Electronic Signatures Under the UETA and ESIGN

- ◆ Legal sufficiency vs. attribution

UETA and ESIGN

- ◆ answer the question “is it a signature?”
- ◆ Do NOT answer the question “is it your signature?”

NYESRA requires it to be your signature to be a signature at all --
definitional precondition

- ◆ Attribution must be proven

UETA and ESIGN -- may be proven by any means, including surrounding
circumstances or efficacy of agreed-upon security procedure

NYESRA -- must be established as an integral part of signature

Burden of proof is on person seeking to enforce signature



Electronic Signatures

Authority, Attribution and Intent

- ◆ E-SIGN and UETA require that:

- The signing party have authority to sign

- ◆ Individuals – identity, age, capacity
 - ◆ Representatives – identity, age, capacity, authorization

- The signature be attributable to the signer and associated with the documents

- The signing party must have the intent to affix a signature to the document



Electronic Signatures

Authority, Attribution and Intent

- ◆ E-SIGN and UETA do not require that:
 - The signature itself provide proof of identity
 - The signature process itself protect the record from alteration without detection



Electronic Signatures

Authority, Attribution and Intent

- ◆ Identity -- current practices in a paper world

 - Individual

 - ◆ "Hail Mary"
 - ◆ Reliance on integrity of post office
 - ◆ In-person identification

 - Representatives

 - ◆ "Hail Mary"
 - ◆ Reliance on integrity of post office – the "presumption of correct delivery" rule
 - ◆ Certificates of authority
 - ◆ The funds transfer hierarchical model



Electronic Signatures

Authority, Attribution and Intent

♦ Identity in remote transactions

“something you are, something you have, something you know.”

Verification

- ♦ SSN verification services
- ♦ Credit card billing address verification
- ♦ Address verification

Transaction structure – e.g. all credit balances must be sent to the same account that is being debited.

The hierarchical model



Electronic Signatures

Authority, Attribution and Intent

- ♦ Intent and authentication

Signer must intend to “authenticate” a document at time of signing

Four basic purposes for authentication

- ♦ I agree to it
- ♦ It came from me
- ♦ I’ve seen it
- ♦ I got it

Purpose of signature derived from surrounding circumstances, just as on paper

Need “indicia of intent”, just as on paper

Need evidence of intent on a “per signature” basis



Electronic Signatures

Authority, Attribution and Intent – Sample Notice

...By clicking "I Accept" at the end of this Agreement, you agree that you have read and understand this Agreement and that you will be bound by and comply with all of its terms...



Electronic Signatures

Authority, Attribution and Intent – Sample Notice

...by checking the consent box on the account signup page,
you represent that you understand and
accept the terms and conditions of this Agreement...



Electronic Signatures

Authority, Attribution and Intent – Sample Notice

NOTICE

BY CLICKING ON THE “I AGREE” BUTTON BELOW, YOU ARE AGREEING TO ALL THE TERMS AND CONDITIONS DESCRIBED ABOVE. CLICKING ON THE “I AGREE” BUTTON WILL RESULT IN AN ENFORCEABLE LEGAL CONTRACT, JUST AS IF YOU HAD SIGNED YOUR NAME TO AN AGREEMENT ON PAPER.



Electronic Signatures

Signature Selection Template

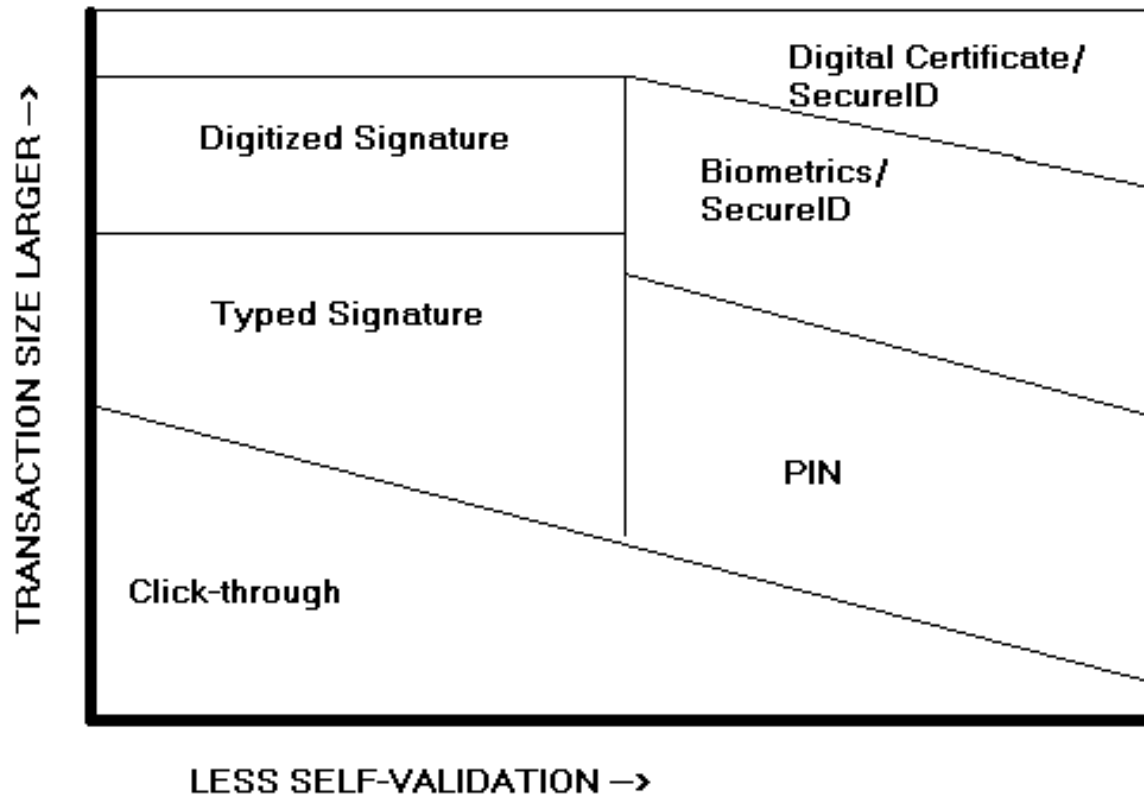
- ◆ **Two primary criteria**

 - Size of transaction or liability exposure

 - Extent to which transaction “self-validates”

 - ◆ Physical presence at signing
 - ◆ Services are personal to signer (e.g. medical, legal)
 - ◆ Physical product being shipped
 - ◆ Product or service is customized to individual

Electronic Signatures Signature Selection Template

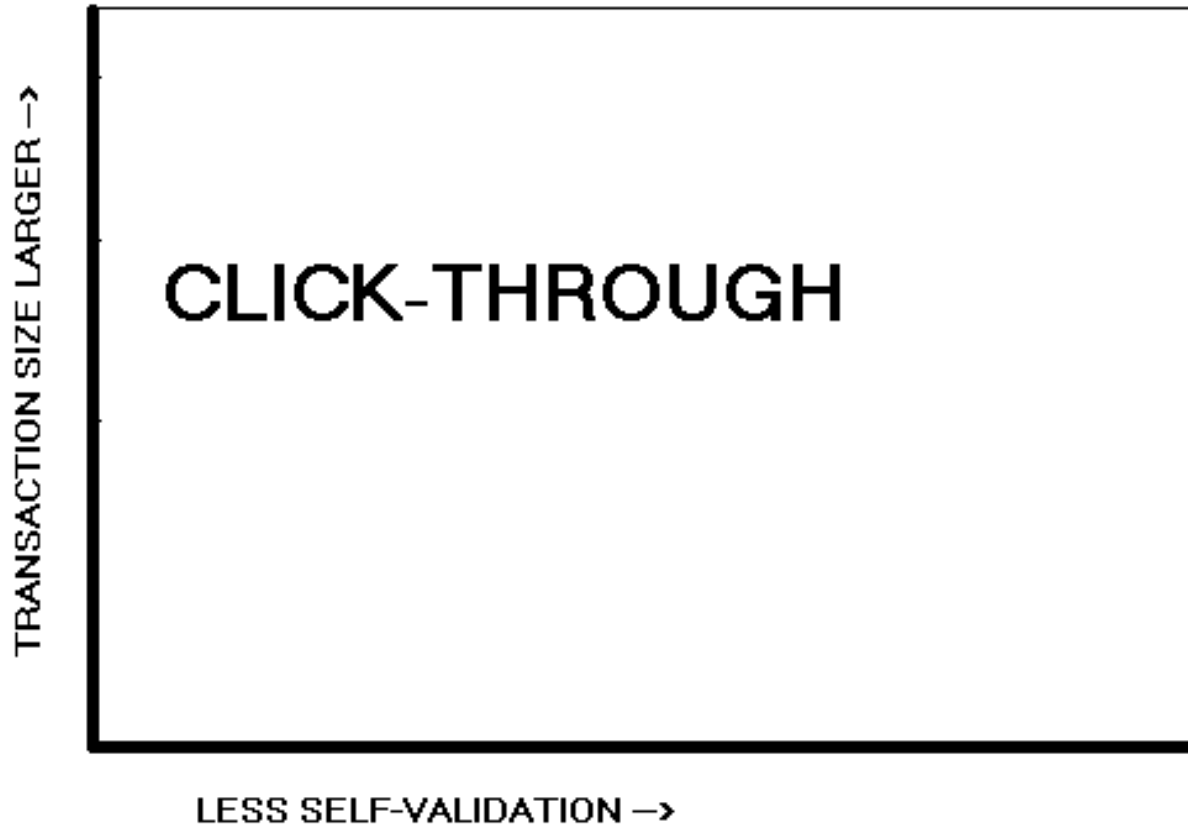


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Electronic Signatures

Signature Selection Template – Business Mgrs.

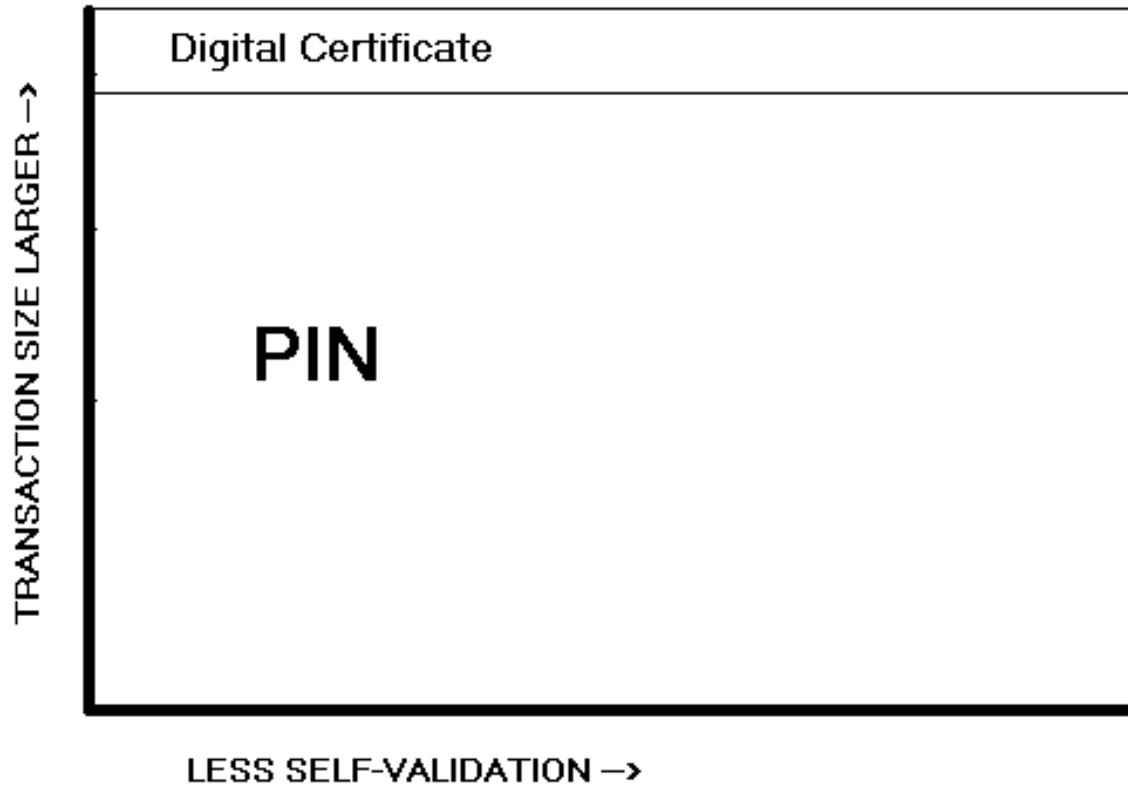


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Electronic Signatures

Signature Selection Template – IT Managers



Electronic Signatures

Signature Selection Template – IT Vendors & Government Regulators

