

# **Electronic Closing Guidance**

## **Introduction**

The approval of fully electronic records is intended to increase the efficiency of the closing process and reduce costs for Lenders, borrowers, and the federal government. In keeping with these objectives:

A. At no point in the closing process may access to electronically submitted HUD forms, data rooms, or electronic storage sites be conditioned on a HUD employee's agreement to terms of service that impose confidentiality requirements, limit the use of the documents, or create any theory of liability (e.g. indemnification/hold harmless clauses) that could be asserted against the federal government or the HUD employee.

B. All parties to the FHA closing process must recognize that Electronic Records used to document FHA healthcare program loans ("FHA Loan Documents") are legally enforceable and secure, and are generally subject to requests under the Freedom of Information Act (5 U.S.C. § 552) and discoverable in litigation involving HUD in accordance with the Federal Rules of Civil Procedure and other legal authorities.

C. Lenders are responsible for identifying any Sensitive PII to be included in an electronic submission, whether in draft or at closing, and arranging for the separate transmission of such information to HUD through proper encryption or other secured means. The standard FHA closing documents generally do not require the disclosure of Sensitive PII with the exception of required rent roll submissions. Requests for confidentiality should be made in writing (*see* 24 C.F.R. §§ 15.107 and 15.108).

## **Part I: Definitions**

Capitalized terms not otherwise defined in this Appendix should be understood as they are defined or used in the FHA Loan Documents or this Handbook.

As used in this Appendix:

**Accessible** means that persons with disabilities (as defined by the ADA) have equivalent access and use of electronic materials to persons without disabilities, with or without the use of assistive technology, and consistent with the requirements of the Rehabilitation Act and the ADA.

**Digital Signature** means a type of Electronic Signature composed of encrypted data produced through the application of hash algorithms and public key cryptography. Digital Signatures may be distinguished from other Electronic Signatures by virtue of the secured means of their creation. Providing a Digital Signature may, for example, require the signatory to deliberately insert an identity card into a computer terminal, provide a unique personal identification number, and/or utilize special software with Digital Signature capabilities. The digital signing process

leaves an audit trail that can serve as important evidence in the event a signature's authenticity is challenged. Digital Signatures are particularly useful in electronic commerce for this reason.

**Electronic Record** as defined by the E-Sign Act means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.<sup>12</sup> All documents provided at closing in accordance with this protocol will be maintained by HUD as Electronic Records.

**Electronic Signature** as defined by the E-Sign Act means an electronic sound, symbol, or process attached to or logically associated with a contract or record and executed or adopted by a person with the intent to sign the record.<sup>13</sup> Electronic Signatures may include manual signatures scanned to an electronic format for transmission as a PDF or comparable file type; Digital Signatures created with the use of electronic authentication software; or such other means of electronic execution as may be sufficient to authenticate the document under governing law.

**Electronic Signature Action** refers to a specific act taken by an individual with the present intent to authenticate an Electronic Record. An Electronic Signature Action may include, for example, the act of keying in a personal identification number ("PIN"); inserting a validation card; clicking an onscreen consent button; or typing in the individual's name.

**Personally Identifiable Information** or "**PII**" means information that can be used to trace an individual's identity either by itself or when combined with other information that can be linked to a specific individual. Examples of PII include an individual's name, date of birth, Social Security Number, e-mail address, mailing address, medical history, family relationships, vehicle identifiers, telephone number, or any other specific information that can directly identify an individual.

**ORCF Records Management System** means any information technology system established by ORCF for the maintenance and retention of Electronic Records. This term may also include any central intake system established by ORCF for receiving FHA Loan Documents, as well as any successor programs to these systems.

**Sensitive PII** is **PII** that could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual if lost, compromised, or disclosed without authorization.

## **Part II: Draft Submissions**

### **Section 2.1. Pre-Closing Consultations**

A. Lender's Attorney should contact the HUD Attorney as soon as practical following a firm commitment's issuance to proactively identify any technical or logistical issues to be resolved in conjunction with an electronic closing, including any issues of complying with Section V (*Electronic Signatures*).

1. Specifically, Lender's Attorney must confirm:

a. any special jurisdictional requirements related to the recording and acknowledgment of the security instrument, regulatory agreement(s), and other recording documents; and

b. the agreement of borrower's counsel to provide FHA closing opinions<sup>14</sup> incorporating the additional electronic closing assurances and confirmations referenced in Section 5.6 and without any special qualifications, assumptions, or other limitations related to the use of Electronic Records. [Instructions and sample language for modifying the FHA closing opinions](#) are available on the HUD website.

2. After consulting with Lender's Attorney and ORCF, the HUD Attorney will advise if any specific closing documents or exhibits will need to be manually signed and/or provided in hard copy due to special jurisdictional requirements or exigent circumstances. Any determination by the HUD Attorney to require hard copies or manual signatures must have prior supervisory approval.

B. For construction loan closings, the Lender should contact the assigned Closer to arrange the pre-construction conference and discuss the process for efficiently transmitting any documents, such as the project plans and specifications, that may be unsuitable for Fully Electronic preparation or retention.

## Section 2.2 Electronic File Types

A. Unless otherwise approved by the HUD Attorney, as noted above, all draft documents intended for electronic submission should be prepared and submitted as either Portable Document Format ("PDF") or as Microsoft Word files.

1. Microsoft Word is the preferred format at the draft submission stage due to the available "comment" and "track changes" features.

2. Regardless of the submission format, documents must appear identical to hardcopy versions when viewed on screen (i.e., appearance and format must not change).

3. Searchable files are strongly encouraged.

4. Lender's Attorney must ensure that all files are Accessible.

B. Special attention must be given to ensure the legibility of ALTA surveys and other documents which may prove difficult to review on a computer monitor. The HUD Attorney may require hard copy versions of such documents.

## Section 2.3. Submitting Draft Closing Documents

This Appendix addresses the submission of closing documents to the HUD Attorney.

A. Documents intended for programmatic review should be submitted in accordance with instructions provided by ORCF. Any specific questions in this context should be directed to the Closer.

B. In general, and unless otherwise agreed by the HUD Attorney, draft documents should be submitted to HUD through a download link from a secure site maintained by a law firm, title insurance company, or other record custodian. If this method is infeasible for a given transaction, Lender's Attorney should discuss alternative arrangements with the HUD Attorney as soon as possible.

1. If submitted through a download link per paragraph 2.3B above, draft documents should remain available for download for at least sixty (60) days.

2. It is the responsibility of the Lender and Lender's Attorney to ensure the documents are Accessible (i.e., comply with accepted standards for use with assistive technology by persons with disabilities) to all HUD staff with review responsibilities including, without limitation, the HUD Attorney, legal support staff, Closer, underwriter, appraisers, and construction analyst. [Resources for making closing documents Accessible](#) can be found on the HUD website.

3. HUD Attorneys may require an alternative method of submission (e.g., zip file) in the event burdensome password requirements make it impractical to access the electronic documents at any stage in the closing process. A password requirement may be considered unduly burdensome if, for instance, it becomes necessary to contact the document's custodian or a technical support representative to gain or regain access.

#### Section 2.4. Checklists and Document Organization Issues

A. The HUD Attorney may reject a submission if the checklist is incomplete, the electronic files are not properly organized and named in accordance with the closing checklist, and naming conventions described in this Section 2.4, or if otherwise materially deficient.

B. The template closing checklists must be tailored for each closing to identify any non-standard documents required to address additional ("special") condition requirements, secondary financing sources, or other project-specific issues. Searchable files are strongly encouraged. The initial draft submission for each loan must include a copy of the proposed checklist in Microsoft Word format for ease of review and comment.

C. Due to HUD system requirements, it is critical to name each electronic file according to the naming convention provided by HUD. The [current document naming conventions](#) are available on the HUD website. Periodic updates will be circulated or published as appropriate. As these conventions are meant to ensure, files must be named so they can be sorted within an on-screen folder for opening and viewing in checklist order.

1. The name for each file should begin with a number corresponding to the applicable exhibit number and document name on the checklist. Certain exhibits, as

numbered on the template checklists, encompass multiple documents. Depending on length, these documents will warrant either separate files or consolidation. In particular:

a. The title policy; title exception documents; UCC searches; protection letter; and agent's authority letter should each be in separate PDF files.

b. If feasible, the closing opinion and incorporated exhibits (e.g., Borrower's Certification; Litigation Disclosure) should be submitted in a manner for easy referencing.

2. As the draft version of the closing checklist may evolve in response to review comments and altered business considerations, Lender's Attorney and the HUD Attorney should review and confirm a final version of the closing checklist prior to the submission of the Final Executed Documents at closing.

### **Part III: Closing**

#### **Section 3.1. (Intentionally omitted.)**

#### **Section 3.2. Recording**

HUD recognizes that state and local requirements for the execution, acknowledgment, notarization, and recording of electronic records may vary between jurisdictions. Lender's Attorney is responsible for navigating these requirements. Section V (*Electronic Signatures*) establishes the acceptable standards for authenticating authorized FHA Loan Documents with Electronic Signatures.

#### **Section 3.3. (Intentionally omitted)**

#### **Section 3.4. The Note**

As a negotiable instrument, the Note will continue to be prepared, executed, and maintained as a single original hard-copy document executed with "wet signatures" and held in the Lender's physical possession. Electronic signatures currently are not authorized for the Note. Section 4.1 identifies additional FHA Loan Documents that must be maintained as "wet signature" hard-copy documents held in the FHA Lender's physical possession.

### **Part IV: Recordkeeping**

## Section 4.1. Lender Responsibilities

This Appendix d does not alter or excuse the FHA lender's full compliance with the FHA contract of insurance, including (without limitation) the statutory, regulatory, or other legal requirements for claiming FHA insurance benefits.<sup>[1]</sup> The FHA Lender must continue to hold and maintain the original FHA Note, security instrument, and certain other FHA Loan Documents in hardcopy and with original "wet" signatures (*See Section V Electronic Signatures* for additional information).

<sup>[1]</sup> *See Legal Instructions Concerning Applications for Full Insurance Benefits - Assignment of Multifamily and Healthcare Mortgages to The Secretary (Form HUD-2510).*

## **Part V: Electronic Signatures**

### Section 5.1. Electronic Signatures in General

HUD permits the use of Electronic Signatures, including Digital Signatures, for FHA Loan Documents and other closing exhibits when provided in accordance with the standards and requirements described in this ECP, Program Obligations, and other program requirements. These requirements are designed, and should be interpreted, to ensure that each signature is legally attributable to the signatory and that the signed document can be maintained for the required record retention period. The use of Digital Signatures is not compulsory when programmatically and legally permitted: closing participants may continue using traditional wet signatures at their discretion.

### Section 5.2. Restrictions

A. Digital Signatures, or other means of Fully Electronic authentication, are unauthorized for the following documents (including any subsequent modifications, amendments, or assignments):

1. Mortgage/Deed of Trust/Security Instrument;
2. FHA Note (*see* Section 3.4); and
3. Building Loan Agreement.

B. The restrictions on Digital Signatures do not preclude scanning manually signed, wet signature documents into Electronic Records (i.e., PDF) for reliance by the HUD. The HUD Closing Attorney will continue relying on such Electronic Records when releasing the FHA Note. However, FHA Lenders must safeguard and maintain the original versions.

C. Industry partners and their legal counsel must research and ensure that all applicable federal, state, and local requirements for electronic documents and related GNMA-eligibility requirements have been met. Industry partners and their legal counsel should be advised that any loans not meeting applicable federal, state, and local requirements for Electronic Records may be ineligible for inclusion in GNMA securities.

### Section 5.3. Jurisdictional Requirements and Limitations

A. Jurisdictional requirements or limitations may require the continued use of wet signatures for certain other closing documents including (without limitation):

1. Title Insurance Policy;
2. Original Security Agreement authorizing UCC filings; and
3. FHA Regulatory Agreement.

B. Lender's Counsel should consult with the HUD Closing Attorney to determine the preferred avenues for addressing state and local requirements for Electronic Records, and Lender's Counsel must provide a written justification supporting any request that deviates from the requirements set forth herein. The Lender's Counsel's written request must explain and appropriately cite the governing legal authorities. Lender's Counsel is also responsible for identifying any related conflicts with other Program Obligations and providing all other supporting documentation requested by HUD. Lender's Counsel should not contact OGC's headquarters' attorneys on such requests except in coordination with the HUD Closing Attorney.

### Section 5.4. Performance Standards

To the extent the Borrower and/or Lender have delivered documents to HUD in an electronic format and/or signed using digital signature software or other electronic means, consistent with Program Obligations and the FHA Lender Initial Approval Certification, any electronic signatures must conform to meet applicable legal, information technology, and administrative requirements, including the Electronic Signatures in Global and National Commerce Act (the "E-SIGN Act") as codified at 15 U.S.C. § 7001 et seq; the Uniform Electronic

Transactions Act (or similar legislation adopted at the state level as in effect in the project's jurisdiction); and prevailing industry standards governing the use of electronic records and signatures in the closing of commercial real estate loans.

At a minimum, the Lender must ensure the security, integrity, and authenticity of all electronic records and signatures submitted for closing are comparable to those meeting the performance standards described in the "Policy on Use of Electronic Signatures" published as Section II A.1.a.i.(A)(4) of the Single Family Housing Policy Handbook 4001. Additional instructions on the submission of electronic documents are available on HUD's website.

#### Section 5.5. Software Compatibility

HUD does not require the use of a particular software program for the creation of Electronic Signatures. So long as Electronic Records are submitted in accordance with the requirements of this Appendix and Program Obligations, Lenders and Lender's Attorney are free to choose from commercially available options. With respect to any documents to be executed by HUD, the Lender must proactively ensure the selected software, platform, or other signature methodology is fully compatible with the HUD signatory's information technology resources and complies with all applicable federal and state laws related to Electronic Signatures. HUD signatories are presently able to provide Digital Signatures on certain documents. The HUD Attorney (with prior supervisory approval) may require manual signatures due to special jurisdictional requirements or exigent circumstances.

#### Section 5.6. Closing Certifications

HUD has developed additional certification requirements for loans closed electronically.

A. All electronic closing submissions must include the Lender's and borrower's electronic closing certifications. Sample electronic closing certifications [Sample electronic closing certifications](#) (including the Attorney No Changes post-closing certification) available on the HUD website.

B. The HUD Attorney will not confirm the authenticity, enforceability, and admissibility of any Electronic Signature, Digital Signature, Electronic Record, or Electronic Signature action with respect to any closing document or exhibit. The HUD Attorney will rely solely on the Lender's and borrower's electronic closing certificates and modified FHA closing opinions as to the enforceability of Electronic Signatures and Electronic Records.

C. All closing documents, including HUD forms, that have an Electronic Signature should be revised to include the following clause incorporating electronic counterpart signature pages:

*This document may be executed in counterparts, including electronic signatures that shall be considered as an original signature for all purposes and shall have the same force and effect as handwritten or manual signatures. "Electronic signatures" shall include manual signatures scanned to an electronic format for transmission (e.g., via portable document format); digital signatures created with the use of electronic authentication software; or*

*such other means of electronic execution as may be sufficient to authenticate the document under governing law. By signing electronically, each party further agrees and consents to waive any objection to the validity, enforceability, and admissibility of any signature contained herewith, to the fullest extent permitted by applicable federal, state, local law, or other requirement.*

D. If any of the documents covered by an FHA closing opinion<sup>1</sup> are executed with an Electronic Signature, the opinion must be modified to include additional provisions related to this form of authentication. [Instructions and sample language](#) for these modifications are available on the HUD website. No other changes to the document's format or substantive content are permitted unless approved by the HUD Attorney in accordance with the established protocols for revising HUD forms.

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<sup>1</sup> Forms HUD-91725-ORCF (Guide for Opinion of Borrower's Counsel Section 232); HUD-92325-ORCF (Guide for Opinion of Operator's Counsel, and Certification Section 232); and HUD-92335-ORCF (Guide for Opinion of Master Tenant's Counsel Section 232).