

**U.S. Dept. of HUD—Office of General Counsel (“OGC”)
Electronic Closing Protocol**

Frequently Asked Questions

This FAQ clarifies certain provisions of the General Counsel’s December 4, 2023 Electronic Closing Protocol Memorandum, as revised and reissued effective March 4, 2024 (the “ECP”), updating the electronic closing procedures adopted during the COVID-19 pandemic for FHA-insured multifamily and healthcare loans.

1. Does the ECP establish formal policy guidance for the Multifamily or Healthcare FHA Programs?

No. The ECP primarily provides instructions to HUD closing attorneys for ensuring the proper execution of electronic closing documents and their transmittal for storage and retention as federal records. OGC developed these instructions to ensure HUD meets its responsibilities under the Electronic Signatures in Global and National Commerce Act (the “E-SIGN Act”), the Federal Records Act, and other legal authorities that are not specific to the FHA programs. In addition, the ECP better aligns OGC’s closing practices with the evolving information technology resources utilized by outside practitioners.

When concerns arise about the ECP’s effect on a particular closing, Section 5.3 C. establishes a procedure for closing attorneys to consult with their supervisors, Office of Regional Counsel, and/or OGC’s Office of Insured Housing. These consultations may result in authorization for transaction-specific departures from the ECP, while also helping to inform HUD’s development of improved FHA closing procedures. Formal waiver requests are not required. Issues requiring consultation under Section 5.3 should be raised early in the closing process.

2. Given the efficiencies already realized, what improvements does the ECP offer over the emergency COVID-19 guidance?

Consistent with the E-SIGN Act, the ECP ensures that FHA lenders and borrowers have the option to utilize digital and other electronic signatures in the closing process. In addition, the ECP formalizes an improved internal process for ensuring the integrity of closing documents that will be collected and retained in electronic form as federal records.

3. How will the ECP affect HUD’s acceptance of manually signed documents that have been scanned and submitted as electronic portable document format (“PDF”) files?

The ECP does not require any signatories to use specific electronic signature software or to otherwise create signatures through electronic means. As during the COVID-19 pandemic, HUD will continue accepting and relying on closing documents that have been manually signed, scanned, and submitted to the closing attorney as PDF files.

4. When does the ECP require FHA lenders or their counsel to provide the new Certification for Post-Closing Submissions?

The Certification of No Changes for Post-Endorsement Docket Submissions (*see* Section 3.3 B.) should be provided when uploading a complete set of the final, fully executed closing documents to the Section 232 Portal after closing as required by the Office of Healthcare Program's current protocols. The certification should be signed by the FHA lender in all cases, and by the FHA lender's counsel when submitting a post-closing set on an FHA lender's behalf. The certification should be included as the first document in the post-closing submission. It should not be identified as an additional exhibit on the closing checklist or forwarded to the closing attorney for review.

5. Will HUD require stand-alone certifications from Lenders and Borrowers who submit electronic records and signatures?

After consulting with the private bar, OGC has determined that stand-alone certifications addressing the use of electronic records and signatures are unnecessary to ensure legal compliance or mitigate programmatic risks. The previously proposed Borrower's Electronic Certificate and Lender's Electronic Certificate forms will be withdrawn.

6. What is the HUD closing attorney's role in ensuring that all parties to a closing understand and consent to HUD's reliance on fully electronic documents?

Closing attorneys will confirm that all standard-form FHA closing documents include an electronic counterpart signature clause as described in Section 5.6 B. FHA lenders and borrowers are encouraged to employ similar clauses when appropriate for exhibits that are not prepared on HUD forms. Whether included or not, HUD will rely on the general validity and enforceability of these electronic records in accordance with the E-SIGN Act (*see* 15 U.S.C. § 7001). In all cases, FHA lenders and borrowers should take reasonable measures to ensure that all parties to the closing consent to reliance on any electronic records or electronic signatures relevant to their project-related obligations.

7. How does the ECP apply to closing exhibits, such as governmental permits and approvals, that are generally prepared outside the FHA lender's or borrower's control?

The ECP does not establish requirements for the execution or issuance of the following closing exhibits:

- Operating licenses, building permits, certificates of occupancy, and other governmental approvals
- Public finance (bonds), accounts receivable financing, bridge loan, or other secondary financing documents that are not prepared on standard HUD forms
- Third-party reports prepared by technical professionals, such as radon inspection reports or O & M plans

Absent clear indications to the contrary, closing attorneys will assume the validity of all signatures on these exhibits whether provided manually or attached by electronic means.

8. How does the ECP's treatment of the standard form FHA closing opinions comport with the usual expectations placed on borrower's counsel?

The ECP continues HUD's longstanding reliance on borrower's counsel to ensure that closing documents are in proper form, duly executed, and enforceable. This responsibility includes offering appropriate counsel to ensure local requirements are met, as well as ensuring there are no impediments under state law to relying on electronic closing documents. Borrower's counsel should be sufficiently familiar with any state statutes (such as the jurisdiction's version of the Uniform Electronic Transactions Act), regulations, case law, administrative decisions, or other legal authorities to identify and address any such requirements or impediments. State legislation enacted in accordance with 15 U.S.C. § 7002 or covered by § 7003 may be of particular concern.

9. Does the ECP require borrower's counsel to opine on the validity of third-party signatures?

No. Borrower's counsel may rely on the validity of third-party signatures to the extent permitted by the template closing opinion forms regardless of whether manually or electronically attached.

The additional confirmation described in Section 5.6 A. of the ECP addresses any jurisdiction-specific legal requirements for relying on electronic records or signatures for the closing of an FHA-insured loan (*see* Question 8). HUD does not expect borrower's counsel to personally oversee the electronic execution of every closing exhibit, particularly when the selected electronic signature software or platform is routinely employed in commercial lending transactions.

If borrower's counsel determines there are jurisdiction-specific impediments to reliance on electronic records in a Project's jurisdiction, these concerns should be addressed in accordance with the process described in Section 5.3.

10. Given the E-SIGN Act has been in effect since 2000, what was the impetus for issuing the ECP now?

While generally quite successful, the electronic closing procedures adopted during the pandemic revealed the need for more specific internal protocols governing OGC's review of electronic closing documents, their delivery to OGC's program client offices, and the long-term storage and retention of these federal records. Chief among these concerns were (i) protecting against unauthorized changes to the FHA closing documents following endorsement and (ii) adapting to the increasing use of electronic signatures in HUD's transactional programs, a trend accelerated by the pandemic.

11. Why did OGC issue the ECP without a notice and comment period?

The ECP is an internal memorandum that provides instructions to closing attorneys. Rather than establishing “Program Obligations” (i.e. housing, healthcare, or other program policy), it establishes certain standard procedures, guidelines, and expectations that will allow closing attorneys to advise their client program offices to rely on fully electronic closing documents when releasing a note endorsed for FHA insurance. OGC has published the ECP so that FHA lenders and their counsel may prepare closing packages that proactively avoid review comments and closing delays that might otherwise arise, as well as identify issues requiring further discussion with OGC early in the closing process. Consistent with the ECP’s purpose, Section 5.3 will allow OGC to tailor its advice as warranted when the ECP proves problematic for a particular closing.

12. How does the ECP apply to loans with firm commitments issued prior to the ECP’s effective date?

The ECP applies only to loans with Firm Commitments issued on or after March 4, 2024. However, FHA lenders may request to close under the ECP for Firm Commitments issued prior to March 4, 2024 to facilitate the use of digital or other types of electronic signatures, in which case the Firm Commitment will need to be amended to reflect such request.

The Certification of No Changes for Post-Endorsement Docket Submissions (Section 3.3 B) is required for all post-endorsement docket submissions regardless of the Firm Commitment date.

13. March 27, 2024 - Editorial correction to ECP Section 5.1

Replace “Digital Signatures” with “Electronic Signatures” in last sentence of paragraph immediately prior to phrase “is not compulsory”.