




U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

GENERAL COUNSEL

March 16, 2020

MEMORANDUM FOR: All Regional Counsel and Deputy Regional Counsel
All Associate Regional Counsel for Programs
All OGC Closing Attorneys

FROM: J. Paul Compton, Jr., General Counsel 

SUBJECT: Contingency Plans for Closing Multifamily Loans and Similar
Commercial Loans during the COVID-19 Pandemic

As you are aware, the world is facing a global pandemic relating to the current COVID-19 Coronavirus outbreak and the President has declared a national emergency. While the Department of Housing and Urban Development and its offices remain open for business at this time, many are now engaged in full-time telework. It is therefore prudent and appropriate for the Office of General Counsel (“OGC”), in collaboration with Multifamily and the Office of Healthcare Programs to establish protocols, rules, and procedures that best ensure continuity of operations in the event of an extended closure of a specific division, regional or field office, or the determination that OGC in its entirety should work remotely. This memorandum sets forth protocols and best practices for the continued provision of legal services by HUD Closing Attorneys while working from home or from another remote location. Also included are suggestions that may be shared with outside counsel to facilitate the work being done remotely by OGC attorneys.

While working to ensure safety for our staff, we must be good stewards for the Department and the American people, including being as flexible as possible in the performance of our duties at this time. It is in troubled times that the continued reliability of FHA lending is most important. I am asking Regional Counsel to ensure the temporary protocols set forth in this memorandum are adopted and applied consistently across the regional and field offices within their purview. When the pandemic subsides and OGC resumes normal closing operations consistently across the country, I will reconsider the temporary protocols in this memorandum. I appreciate everyone’s cooperation during these exigencies.

I. Restricting In-Person contacts

OGC’s first goal is ensuring the health and safety of its employees, clients, and stakeholders. During the COVID-19 pandemic, OGC will use enhanced flexibility. To that end, OGC will adopt a policy of avoiding in-person attendance at gatherings to the greatest extent possible. OGC attorneys are encouraged to participate via telephone or other electronic means to ensure free and open communication. OGC attorneys should also conduct meetings and closings by mail or electronic means as provided for in this memorandum to the greatest extent feasible.

II. Attorney Assignments

Regional Counsel will continue to manage the attorney assignment process for closings,

asset management requests, and other transactional work as necessary. Regional Counsel will consider staff availability, client deadlines, and the IT resources available to each employee in making assignments. OGC's IT division will be available to consult and aid in exploring options to facilitate electronic reviews at remote locations. Upon assignment, the assigned attorney will be responsible for making prompt contact with the requesting program office and industry partners to establish mutual expectations, communication protocols, and shared goals for completion of the work matter.

III. Review and Approval of Draft Closing Documents

While OGC attorneys are working remotely, we must recognize that most of our industry partners are similarly adjusting to new working conditions and will not be able to carry on business as usual unimpeded. As a result, OGC attorneys must rely on electronic transmission of closing documents in lieu of hard copies in performing their initial reviews. This approach will ensure the continuation of reviews even if our external partners are unable to physically transmit the volume of paper documents needed at this stage. While providing increased flexibility to lenders in submitting closing documents, this protocol does not authorize any additional substantive modifications to the closing process without approval of the appropriate Regional Counsel and the Office of Insured Housing in Headquarters.

1. Draft Closing Submission: Consistent with the approach of Multifamily Housing, OGC will accept draft closing packages in fully electronic form. If a hard copy of the survey is available for submission, it may be provided by mail to the closing attorney. The unavailability of a hard copy of the survey will not be an acceptable reason to delay review of the draft closing package (although closing will remain contingent on an adequate title and survey review and the appropriate resolution of any identified issues). To ease the transition to an electronic review process, a series of "Best Practices" is attached to the memorandum and may be shared with outside counsel as appropriate.

Recognizing that various lenders and their counsel may have security protocols in place governing the transmission of electronic documents, OGC will accept electronically transmitted documents in various means provided the transmitter can provide assurances as to the security of the transmission. Additionally, the electronic submission must be accessible by all HUD reviewers and cannot be unnecessarily restricted to impede access from appropriate parties within the Department.

2. Supplemental Submissions: The HUD Closing Attorney and Closing Coordinator will provide written comments to the FHA lender's counsel by e-mail. The FHA lender's counsel should submit the revisions and supplemental documents via email or in the same fashion as the original electronic submission. The HUD Closing Attorney may request that documents submitted include comparisons ("redlines") showing changes from the last version reviewed.

IV. Updates to Closing Processes

While the present circumstances warrant alterations to the usual closing process, the increased flexibility must be implemented without meaningfully increasing HUD's risk.

1. Pre-Closing: Once HUD has provided written clearance to the Lender that the transaction is ready to close, the FHA lender's counsel is responsible for coordinating the submission of the final, executed documents by mail, in electronic form, or a combination thereof. The HUD Closing Attorney should hold a call with the Lender's counsel prior to the final submission to ensure that everyone is clear on the method of submission. The HUD Closing Attorney will advise the FHA Lender's counsel as to the address for delivery of the final documents.

a. Pre-Recording: OGC prefers the pre-recording of the FHA security instrument, regulatory agreement, and other recorded documents where possible. The FHA lender's counsel holds primary responsibility for coordinating the signature process for all documents other than the FHA note and HUD regulatory agreement. OGC will accept Gap coverage (as is typically done in New York) when pre-recording is not feasible.

b. FHA Note and Regulatory Agreement: This protocol **does not** authorize the execution of the FHA note, mortgage, regulatory agreement, or other loan documents using a digital signature or other means of fully electronic authentication. In lieu of hard copy documents, however, FHA will accept electronic copies (i.e. scanned PDFs) of manually executed documents and will rely on such documents for purposes of releasing the endorsed FHA note at closing. The closing opinion delivered by borrower's counsel may not be modified to include additional qualifications or limitations related to the use or reliance on scanned documents unless discussed and approved by the HUD Closing Attorney. The HUD Closing Attorney will not approve such changes unless (i) clearly warranted by a duly cited state statute or local ordinance and (ii) the modification results in no additional FHA risk.

The FHA Lender's counsel should arrange for delivery of the note, mortgage, regulatory agreement and any other transaction-specific recording documents to the authorized HUD signatory via an overnight courier. The FHA Lender's counsel should also include prepaid mailing labels to ensure delivery of (i) the executed documents from the HUD signatory to the HUD Closing Attorney or other designated HUD official for safe-keeping until closing; (ii) all documents to be recorded to the appropriate recipient for recording; and (iii) the endorsed note to the FHA lender (or its designee) after endorsement.

Arrangements will be made by OGC and Housing to ensure the note is endorsed prior to closing and held by the HUD Closing Attorney or other designated HUD official for safekeeping until the closing is completed. At this time, HUD cannot release the FHA note prior to closing even if the Lender's counsel offers to hold the note in escrow or have the note escrowed by a third party.

2. Closing Process: As with a roundtable closing, the HUD Closing Attorney will ensure the documents, as executed, conform to the approved drafts.

a. Starting Time: The final documents, whether provided electronically or in hardcopy, should arrive no later than 10:00 a.m. the morning of closing, unless all parties to the

transaction have agreed in writing to an alternate time of arrival.

b. Electronic Delivery Considerations: Where closing documents must be delivered by electronic means, the following considerations must be met:

1) The submission must be organized for easy and efficient review on a computer monitor. Each submission should include a closing checklist to ensure efficiency of review and document location.

2) If delivering via an electronic medium, the medium must be brand new, unencrypted, and contain no files other than the closing submission. Further, the drive may not be write-protected or otherwise secured in a manner that precludes the HUD staff from adding additional files.

3) If alternative electronic delivery is arranged including, for example, delivery through a law firm's or title company's proprietary document storage site, these sites may not impose use conditions on HUD staff, e.g., requiring execution of an indemnification agreement.

4) The electronic submission should include signed certification evidencing the FHA lender's agreement (i) to provide an original, hard-copy set of the electronic documents once normal operations resume and (ii) to include a certification with the hard copy set that confirms the documents fully conform to the electronic versions accepted at closing.

c. Errors: In the event a need for revisions is discovered at closing, the FHA Lender's counsel will be responsible for transmitting, electronically or via courier, the complete corrected document(s) for the HUD Closing Attorney to consolidate with the full submission. Slip pages will not be accepted for electronic closings, unless approved in writing by the HUD Closing Attorney. The HUD Closing Attorney may suspend the closing, upon consultation with the client office and Regional Counsel, if the provided documents are determined to be materially deficient.

d. Title Delivery: The FHA Lender's counsel should make every effort to ensure the title insurance policy and, if customary in the closing jurisdiction, the recorded documents are organized and included in the same submission as the other closing documents. However, the HUD Closing Attorney will permit a separate submission from the title company or outside counsel when warranted by jurisdictional requirements, local custom, or other good cause.

1) If the time-stamped recorded documents are not available, the title company's recording certification should be scanned as the first page.

2) The title insurance policy should contain an electronic signatures endorsement.

e. Endorsed Note Release: Once all closing conditions are met, the HUD Closing

Attorney will advise the FHA Lender's counsel that the note is ready for release. The FHA lender's counsel should provide instructions for the return of the FHA note including a prepaid overnight mailing envelope that will provide for pick up at a designated location. A messenger service may also be engaged to collect the FHA note from the designated location. FHA Lenders should be cognizant that a HUD Closing Attorney working remotely may be unable to accommodate requests to have the endorsed note scanned and circulated via e-mail on the day of closing. Upon request, it may be possible for the HUD Closing Attorney to electronically transmit a photograph of the endorsed note.

3. Additional considerations for electronic closings: While OGC anticipates deploying a largely electronic closing process until normal operations resume, circumstances may arise where closing by mail is not practical and the assigned Closing Attorney is unable to reasonably close the loan electronically. In such cases, the appropriate Regional Counsel (or the Regional Counsel's designee) may reassign the transaction for closing. The attorney receiving the reassignment will generally be expected to rely on the legal work previously completed and continue with the closing as scheduled. Moreover, we acknowledge that circumstances are in flux and it is highly recommended that all parties anticipate possible delays, making every effort to schedule closings in advance of significant deadlines. The HUD Closing Attorney must strive to manage the expectations of all parties to a transaction and communicate developments as soon as it is reasonably possible in order to facilitate an orderly closing process.

V. Asset Management/Assisted Housing. Similar to FHA closings, each Regional Counsel's Office will adapt its assignment process to accommodate the needs of Healthcare, Public Housing, and Community Planning and Development clients. Submission requirements for these requests will be determined on a case-by-case basis with the understanding that, absent special and unique circumstances, all documents will be submitted electronically.

Best Practice Recommendations for Electronic Submission of Documents

1. **Document Preparation:** Each draft document should be prepared in accordance with the following recommendations:

a. Drafts should be prepared and submitted in either Portable Document Format (“PDF”) or as Microsoft Word documents, with Microsoft Word being the preferred format at the draft submission stage due to the available “comment” and “track changes” features.

b. Documents should appear identical to hardcopy versions when viewed on screen (i.e. appearance and format must not change).

c. The HUD closing attorney may request that documents be submitted as comparisons (“redlined”) against the standard form closing documents.

d. Special attention must be given to ensure the legibility of ALTA surveys and other oversized documents which may prove difficult to review on a computer monitor.

2. **Package Organization:** The electronic draft submission should be organized and submitted in a manner that facilitates ease of use and efficient review by HUD staff.

a. **Ease of Use:** Special care should be given to ensure the electronic files are easily identifiable (as discussed below) and do not require excessive searching and scrolling. Searchable files are strongly encouraged.

b. **Checklist:** A detailed and comprehensive closing checklist is an essential component of the electronic closing process. While the template checklists (*see* Part 4 of the Federal Housing Administration Multifamily Program Closing Guide) provide the framework, these forms should be customized to reflect each transaction’s specific details including, without limitation, reasonably identifying **all documents** required for closing.

c. **Naming Convention:** Each electronic file should be named to correspond to a document listed on the transaction’s customized checklist and to permit on-screen viewing in checklist order.

1) The name for each computer file should begin with a number corresponding to the applicable Exhibit number on the checklist. For instance, as Exhibit 8 on the 223(f)/207 checklist, the vesting deed PDF would be named “08 Vesting Deed”.

2) Certain Exhibits, as numbered on the template checklists, encompass multiple documents. Depending on length, these documents will warrant either separate files or consolidation into a single PDF file. In particular:

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

b) If feasible, the closing opinion and incorporated exhibits (e.g. Borrower's Certification; Litigation Disclosure) should be contained in a single PDF file.

3) Secondary financing documents, as well as documents needed to clear special conditions, require special attention as these documents are not shown individually on the checklist templates. They will need to be drafted into the customized version. Generally, these documents will be too voluminous to be group into a single PDF file.

Based on the current checklist templates (5/2019), a suggested organizational and naming convention would be as follows:

Checklist	Electronic Naming Convention
1.d. Exhibit B—Additional Conditions SC 1—[document name] SC 2—[document name] SC 3—[document name]	01 d SC 1 [document name] 01 d SC 2 [document name] 01 d SC 3 [document name]
49.A. Bridge Loan: [Lender/Amount] 1. Loan Agreement 2. Bridge Note 3. Pledge	49 A 1 [Lender] Loan Agreement 49 A 2 [Lender] Bridge Note 49 A 3 [Lender] Pledge
49.B. Subordinate Loan: [Lender/Amount] 1. Loan Agreement 2. Promissory Note 3. Security Instrument 4. UCC Financing Statements 5. Restrictive Covenant 6. Subordination Agreement	49 B 1 [Lender] Loan Agreement 49 B 2 [Lender] Promissory Note 49 B 3 [Lender] Security Instrument 49 B 4 [Lender] UCCs 49 B 5 [Lender] Restrictive Covenant 49 B 6 [Lender] Subordination

