

Date: March 5, 2014  
To: All Texas Agents  
From: David Hays, Vice President/Underwriting Counsel  
RE: New Estates Code

## **The New Estates Code and Power of Attorney**

Over the past two legislative sessions the Texas Legislative Council has been engaged in a non-substantive revision of the Texas Probate Code. On January 1, 2014, these revisions became effective. This statutory change eliminates the Texas Probate Code on a go-forward basis and in its place establishes the new Texas Estates Code. (The "old" Texas Probate Code will continue to control those probate matters occurring and originating prior to January 1, 2014).

### **How Does This Affect the Agent?**

Establishment of the new Estates Code resulted in a new Statutory Durable Power of Attorney Act. The Statutory Durable Power of Attorney Act, formally located in Sections 481-506 of the Texas Probate Code, is now located in Sections 751-752 of the new Texas Estates Code. In addition, the format of the Statutory Durable Power of Attorney ("SDPOA") form has been amended. **The new Statutory Durable Power of Attorney form was also effective January 1, 2014.**

A SDPOA executed January 1, 2014, or later must be in substantially the same format as the form set forth in the new Texas Estates Code (Section 752.051). **FNTI will not accept a Statutory Durable Power of Attorney that is executed January 1, 2014, or later that is drafted using the old form.** We will accept an SDPOA drafted using the old form provided it is executed prior to January 1, 2014. We will also continue to accept Powers of Attorney drafted on non-statutory forms on a case-by-case basis. All such Powers of Attorney should be reviewed by your underwriting counsel.

There are some principal differences between the new form provided in the Texas Estates Code and the old form as set forth in the old Texas Probate Code. You should take note of these differences and their effect on your ability to accept a new Statutory Durable Power of Attorney.

- 1) One of the principal differences is that the new form contains a heading referring back to the new Texas Estates Code for purposes of defining the listed powers: ("NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE."). The former Statutory Durable Power of Attorney form contains a notice referring to the old Texas Probate Code. A new SDPOA, executed January 1, 2014, or later must contain the new notice. A SDPOA executed January 1, 2014, or later, that contains the old notice referencing the Texas Probate Code, is not acceptable.

- 2) Under the new Statutory Durable Power of Attorney, the principal no longer crosses out those powers for which he or she does not wish to give the agent and instead opts for an affirmative, initialing approach, wherein the principal will initial those powers he or she **intends** to grant the agent.
- 3) There is no longer a general power of attorney clause included in the new form. As you may recall, the old SDPOA form included the following clause: *"If no power above is **crossed out**, this document shall be construed and interpreted as a general power of attorney and my agent shall have the power and authority to perform or undertake any action I could perform or undertake if I were personally present."*

The new form does not contain this general power of attorney clause. Inevitably, you will be given a new form SDPOA that fails to include any initials as to the powers granted to the agent. Absent authority granted by the principal in the "Special Instructions" section of the document, a form SDPOA that is signed by the principal but fails to include any initialed powers, is presumed to be ineffective in granting any authority to the agent.

In addition to the new requirements and changes to the Statutory Durable Power of Attorney form, FNTI continues to require the following:

- 1) Any Power of Attorney to be used in connection with the closing of a home equity loan or a reverse mortgage must be executed and notarized at the office of the title company or the lender. If executed at the office of the lender, we will require a written certification from the lender that the Power of Attorney was executed at its office. (See Underwriting Bulletin 2013-04)

<http://fnti.com/docs/Underwriting%20Bulletins/UnderwritingBulletin%202013-04%20Home%20Equity%20Loans.pdf>

- 2) **Death of the Principal terminates a Power of Attorney.** Agents must verify on the day of closing that the Principal is living and has not revoked the Power of Attorney.
- 3) If a Power of Attorney states that it is to be effective only upon the incapacity of the Principal, the agent must obtain a letter from the Principal's attending physician confirming the Principal's incapacity. Keep in mind that the terms of a Power of Attorney may provide for more strict requirements when determining incapacity. In such a case, the agent must follow the stricter requirement. Conversely, if the Power of Attorney provides for a less strict determination of incapacity, the agent must adhere to FNTI's requirement stated above.
- 4) Any changes to a Power of Attorney made after the Power of Attorney has been signed and notarized may act to void the Power of Attorney. Initialed changes after the execution of the Power of Attorney are not acceptable and vest no power in the agent.
- 5) Unless previously recorded in the county in which the subject property is located, the agent should obtain the original Power of Attorney and file the document at closing in the county where the subject property is located.

If you have any questions regarding the validity or proper use of a Power of Attorney, please contact the FNTI Underwriting Department.