



**First American Title Insurance Company of New York
CURRENT DEVELOPMENTS
SPECIAL EDITION**

**FREQUENTLY ASKED QUESTIONS
NEW STATUTORY SHORT FORM POWER OF ATTORNEY**

This list of frequently asked questions addresses certain issues that have been raised in connection with New York State's new form of Statutory Short Form Power of Attorney ("SSF Power") and new Statutory Major Gifts Rider ("SMGR"). These forms were promulgated by Chapter 644 of the Laws of 2008 ("Chapter 644"), as amended by Chapter 4 of the Laws of 2009, and can be executed on and after September 1, 2009.

A. Who can execute the new form of SSF Power?

A "Principal" executes a SSF Power. New General Obligations law ("GOL") Section 5-1501 defines a "Principal" as "an individual who is eighteen years of age or older who executes a power of attorney". There is no indication that this includes an individual acting in representative capacity, such as an individual acting as an Executor or a Trustee.

B. Is the new form of SSF Power if executed on or before August 31, 2009 effective?

The new form of SSF Power must be executed on or after September 1, 2009.

New GOL Section 5-1501B states "[t]he date on which an agent's signature is acknowledged is the effective date of the power; provided, however, that if two or more agents are designated to act together, the power of attorney takes effect when all of the agents so designated have signed the power of attorney with their signatures acknowledged".

First American will not insure based on a new form SSF Power executed by the Principal on or before August 31, 2009, even if an Agent executes the power of attorney on or after September 1. There is no basis in Chapter 644 to conclude that this is permissible.

C. Must the new form of SSF Power be executed if a SSF Power was executed on or before August 31, 2009 based on the law then in effect?

Section 21 of Chapter 644 states "...the provisions of this act shall not affect the validity of any power of attorney or the conveyance of authority to an attorney-in-fact or agent contained in a power of attorney executed prior to the effective date of this act if such power of attorney was valid at the time of its execution..." There is no requirement that a form SSF Power be executed to replace a statutory form of power duly executed as required by the law in effect on and prior to August 31, 2009.

In relying on a SSF Power duly executed as required by the law in effect on and prior to August 31, 2009, the usual affidavit that such power of attorney remains in force and effect is to be obtained and, of course, the records in the county recorder's office must be examined for any later executed powers of attorney. As noted below, execution of a new form of SSF Power will, unless otherwise specifically stated in the new form, revoke an earlier executed power of attorney.

D. Does execution of a new form SSF Power revoke a SSF Power executed on or before August 31, 2009 based on the law then in effect?

According to new GOL Section 5-1511, "[u]nless the principal expressly provides otherwise, the execution of a power of attorney revokes any and all prior powers of attorney executed by the principal". The new SSF Power, as set forth in new GOL Section 5-1513, includes the following statement:

"(e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under 'Modifications.'

If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under 'Modifications' whether the agents given these powers are to act together or separately".

E. Can real property be transferred pursuant to a new form SSF Power of Attorney without the concurrent execution of a SMGR?

There is some confusion as to whether Chapter 644 authorizes the transfer of an individual's interest in property to a bona fide purchaser for value pursuant to a new SSF Power without the concurrent execution of a SMGR. The intention of the state legislature, as related to this reporter by persons involved in the drafting of the Bill enacted as Chapter 644, was not to require a SMGR in such a case. It is anticipated that state legislation making that position clear will be enacted.

F. Will First American insure a transfer of real property to a bona fide purchaser for value under a new form SSF Power without an executed SMGR?

At the present time, First American will insure a transfer of real property or of a cooperative interest to a bona fide purchaser for value for consideration pursuant to the authority contained in a duly executed new SSF Power, provided that there is no apparent indication that the property is being conveyed for less than its approximate fair market value and the authority for the transaction is confirmed with the Principal of the Power at the time of the closing by the title closer. A conveyance for consideration where there is an obvious disparity between the price being paid and the property's value may be deemed to be, in part, a gift, requiring a duly executed SMGR.

Notwithstanding, whenever a property interest is being transferred pursuant to the new form of SSF Power, given the confusion as to whether a transfer of an interest in real property to a bona fide purchaser for value can be made pursuant to the new SSF Power without the concurrent execution of a SMGR, it is prudent at this time to execute a SMGR with a SSF Power in all instances and it is strongly urged that a SMGR be so executed.

In addition, pending clarification by the State Legislature, when there is in effect a statutory form of Power, duly executed as required by the law in effect on and prior to August 31, 2009, it is suggested that a new SSF Power not be executed, and that the transaction proceed based on the existing power of attorney.

If, however, a new SSF Power must be executed, the power of attorney should expressly state, as noted above, that the prior power of attorney is not revoked. It is suggested that the authority of the attorney-in-fact under the prior power of attorney in connection with real estate transactions be specifically confirmed.

G. What is the procedure when a SMGR is to be executed in connection with a transfer of real property?

1. In Section "(f)" ["Grant of Authority"] in the SSF Power, the Principal must initial in the bracket next to either "(A) real estate transactions" or "(P) Each of the matters identified by the following letters _____", with "P" completed as required;
2. The Principal must initial the indented paragraph following the preamble of Section "(h)" in the SSF Power; and
3. The Principal must initial in the bracket next to the third paragraph in Section "(b)" ["Modifications"] of the SMGR, and set forth immediately following that paragraph the Agent's authority to transfer the real property. The bracket next to the second paragraph in Section "(c)" must, alternatively, be initialed, and the instructions

to the Agent must be set forth in Section "(c)", if the Agent is to be authorized to transfer real property to himself or herself.

4. The SSF Power must be executed by the Principal and the Agent(s) with their signatures acknowledged. The SMGR must be executed by the Principal before two witnesses with the signature of the principal being acknowledged. The SMGR must be dated the same date as the date of the SSF Power.

H. Is a new form SSF Power effective if the Principal becomes incapacitated before the Agent executes the SSF Power?

Under new GOL Section 5-1501A, "[a] power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal". It also states that "[a] power of attorney executed pursuant to this section is not invalid solely because there has been a lapse of time between the date of acknowledgment of the signature of the agent acting on behalf of the principal or because the principal becomes incapacitated during any such lapse of time".

I. What are the requirements for a power of attorney being executed by a condominium unit owner to the Board of Managers?

A new SSF Power executed by a unit owner to the Board of Managers of a condominium is a non-statutory form of power of attorney. As such, it must meet the following requirements in new GOL Section 5-1501B and, presumably, the requirements of subdivision 9 of new GOL Section 5-1514:

GOL Section 5-1501B -

"1. To be valid, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by an individual, must:

(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.

(b) Be signed and dated by a principal with capacity, with the signature of the Principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.

(c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property...

(d) Contain the exact wording of the: (1) "Caution to the Principal" in paragraph (a) of subdivision one of section 5-1513 of this title, and (2) "Important Information to the Agent" in paragraph (n) of subdivision one of section 5-1513 of this title.

2. In addition to the requirements of subdivision one of this section, to be valid for the purpose of authorizing the agent to make any gift or other transfer described in section 5-1514 ['Major gifts and other transfers'] of this article...

(b) a non-statutory power of attorney must be executed pursuant to the requirements of paragraph (b) of subdivision nine of Section 5-1514 of this chapter".

GOL Section 1514.9 -

"9(b) ...[Be] witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described in paragraph two of subdivision (a) of section 3-2.1 of the estates, powers and trusts law".

J. What if there are multiple agents under a new SSF Power, required by the power of attorney to act jointly, and one of the agents is not available to execute the closing instruments?

Under New GOL Section 5-1508 "...[u]nless the principal provides otherwise in the power of attorney, the co-agents must act jointly. However, if prompt action is required to accomplish a purpose of the power of attorney and to avoid irreparably injury to the principal's interest and a co-agent is unavailable because of absence, illness or other temporary incapacity, the other co-agent or co-agents may act for the principal. Unless the principal provides otherwise in the power of attorney, if a vacancy occurs because of the death, resignation or incapacity of a co-agent, the remaining agent or agents may act for the principal".

Whether First American will insure based on a new SSF Power when an Agent is "unavailable because of absence, illness or other temporary incapacity" will be determined in each instance by a First American Branch or Agency counsel.

K. What form of power of attorney is required to be submitted with transfer tax forms which are being executed by a power of attorney?

The New York State Department of Taxation and Finance has issued new forms of power of attorney with a date reference of September 2009 that comply with the requirements of Chapter 644 of the Laws of 2008. The forms may be used in connection with tax matters before the Department and the New York City

Department of Finance. POA-1 ("Power of Attorney"), POA-1-IND ("Power of Attorney for Individuals"), and instructions, as to the new forms are posted at:

http://www.tax.state.ny.us/pdf/current_forms/misc/poa1.pdf

http://www.tax.state.ny.us/pdf/current_forms/misc/poa1_ind.pdf

The State and the City have informally advised as follows:

The State will accept a Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax ("TP-584"), a Nonresident Real Property Estimated Income Tax Payment Form ("IT-2663"), and a Nonresident Cooperative Unit Estimated Income Tax Payment Form ("IT-2664") (collectively herein "State Tax Forms") executed pursuant to a power of attorney which is either (i) the applicable form of power of attorney just issued by the State Department of Taxation and Finance, (ii) the prior form of statutory short form of power of attorney if executed on or before August 31, 2009, (iii) the new statutory short form if executed on or after September 1, 2009, or (iv) a non-statutory power of attorney executed on or after September 1, 2009 meeting the following requirements, as set forth in Notice N-09-17:

- Be signed and dated by an individual taxpayer and the taxpayer's signature must be acknowledged before a notary public;
- Be signed and dated by the representative and the representative's signature must be acknowledged before a notary public even if the representative is licensed to practice in New York State or is a New York State resident who is an enrolled agent with the IRS;
- Be legible or of clear type of no less than 12 point in size; and
- Include the exact wording of the Caution to the Principal and Important Information for the Agent found in General Obligations Law section 5-1513.

See Notice N-09-17 at http://www.tax.state.ny.us/pdf/notices/n09_17.pdf:

New York City will accept a Real Property Transfer Tax Return ("NYC-RPT") executed pursuant to a power of attorney which is either (i) the applicable form of power of attorney just issued by the State Department of Taxation and Finance, (ii) the prior form of statutory short form of power of attorney if executed on or before August 31, 2009, (iii) the new statutory short form if executed on or after September 1, 2009, or (iv) a non-statutory power executed as required by Chapter 644 of the Laws of 2008 on or after September 1, 2009, presumably meeting the requirements set forth in the bullet points set forth above.

L. How many original powers of attorney are to be submitted when transfer tax forms are executed by a power of attorney?

New York State's Department of Taxation and Finance and New York City's Finance Department have informally advised as follows:

1. If State Tax Forms signed by a power of attorney for a document to be recorded are filed directly with the State before the document is submitted for recording, outside the recording process, both the State and the local recorder will require an original power of attorney.

2. If State Tax Forms, and the NYC-RPT when the property in question is in New York City, signed by a power of attorney, are being filed outside the recording process with no document to be recorded, such as is the case with a cooperative interest, often with a leasehold assignment, or with a contract assignment, the State and the City will each require an original power of attorney.

3. If a power of attorney used to sign State Tax Forms, and the NYC-RPT when the property in question is in New York City, must be recorded to simultaneously record a document signed by the power of attorney, a copy of the power of attorney is to accompany each of the State and City forms.

4. If, with documents being submitted for recording, State Tax Forms and, when the property in question is in New York City, the NYC-RPT are signed pursuant to new forms POA-1 ("Power of Attorney") or POA-1-IND ("Power of Attorney for Individuals"), the original power of attorney is to accompany one of the State or City forms with a copy of the power accompanying the other form. If the property is outside of New York City, the original power of attorney is to accompany the State Tax Forms.

5. If the State Tax Forms and, when the property in question is in New York City, the NYC-RPT are being signed pursuant to a power of attorney, but the documents being submitted with those forms were not signed by a power of attorney, which may occur when the documents are signed in advance of closing, the original power of attorney is to accompany one of the State or City forms with a copy of the power accompanying the other form. If the property is outside of New York City, the original power of attorney is to accompany the State Tax Forms.

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