

Retroactive Amendments to New York's Power of Attorney Law

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On August 13, 2010, the Governor of New York signed into law significant amendments to New York's power of attorney statute.¹ The amendments are technical corrections intended to clarify ambiguities in last year's amendments to the power of attorney statute. Effective September 12, 2010, with retroactive effect to September 1, 2009, powers of attorney granted in connection with most business, commercial and real estate transactions are not subject to the statute's requirements, including the heightened fiduciary standards and execution formalities. In addition, powers generally will no longer be subject to a presumption of automatic revocation by new powers. This memorandum provides a brief overview of the amendments.

Background

On March 1, 2009, the New York legislature adopted comprehensive amendments to the power of attorney statute.² These changes were intended to stem abuse in the estate-planning context and modernize various aspects of the statute.³ Although the provisions of the law were intended to govern only powers of attorney created by individuals for personal financial and estate matters, the statute facially applied to every written power created by an individual in New York — including powers governed by the law of another jurisdiction.⁴

The statute's extensive notification, content, formatting, notarization and witness requirements imposed burdensome formalities on business and commercial transactions. It also made the continuing validity of powers uncertain by introducing an automatic deemed revocation of all previous powers if a new power did not state an intent to the contrary. Further, the statute appeared to impose fiduciary duties on agents in areas where such duties are generally specifically excluded (*e.g.*, UCC indorsements)⁵ or limited or nonexistent (*e.g.*, transactions where the power is coupled with an interest).⁶

¹ See 2010 N.Y. Laws ch. 340; N.Y. Gen. Oblig. Law §§ 5-1501 to 5-1514 (2010) (hereinafter "GOL"), available at <http://public.leginfo.state.ny.us>. Certain provisions are effective retroactively. See 2010 N.Y. Laws ch. 340 § 31.

² GOL §§ 5-1501 et seq. (2009). The amendments were originally effective March 1, 2009; however, Governor Paterson signed legislation extending the effective date to September 1, 2009. See 2009 N.Y. Laws ch. 4, sec. 1, § 21.

³ See generally 23A N.Y. CONSOL. LAWS ANN. Gen. Oblig. Law tit. 15, Practice Commentaries, pp. 71-76 (McKinney 2010).

⁴ For a discussion of the prior law, see [Changes to New York's Power of Attorney Law]. A number of fundamental interpretive issues were also addressed in a White Paper in which a number of New York law firms concurred, including Skadden. See Interpretive Issues Related to Recent Changes to the New York Power of Attorney Law, various signatories (Jan. 19, 2010) (the "White Paper").

⁵ White Paper at 8.

⁶ A "power given as security" (or a "power coupled with an interest") is to be distinguished from a power of attorney that creates an agency relationship because "[i]t is given to protect a legal or equitable title or to secure the performance of a duty apart from any duties owed the holder of the power by its creator that are incident to a relationship of agency." RESTATEMENT (THIRD) OF AGENCY § 1.04 (6) & cmt. f (2006).

These and other serious concerns about the 2009 law were raised by the New York Bar,⁷ spearheaded by the NYSBA Power of Attorney Working Group. The Working Group's report was transmitted to the Legislature and many of its recommendations were incorporated into the technical corrections bills passed by the legislature,⁸ which the Governor signed into law on August 13, 2010 (the "2010 Amendments").⁹ The following discussion highlights the key amendments.

Summary of the 2010 Amendments

Exclusion of Business, Commercial and Real Estate Powers

The 2010 Amendments exclude powers of attorney granted in connection with business transactions from the requirements of the statute. Regardless of whether they are granted by entities or individuals, the following powers are excluded from the definition of "Power of attorney" and thus from the application of the statute:

1. a power of attorney given primarily for a business or commercial purpose, including without limitation: (a) a power to the extent it is coupled with an interest in the subject of the power; (b) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction; (c) a power given to facilitate transfer or disposition of one or more specific stocks, bonds or other assets, whether real, personal, tangible or intangible;
2. a proxy or other delegation to exercise voting rights or management rights with respect to an entity;
3. a power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose;
4. a power authorizing a third party to prepare, execute, deliver, submit and/or file a document or instrument with a government or governmental subdivision, agency or instrumentality or other third party;
5. a power authorizing a financial institution or employee of a financial institution to take action relating to an account in which the financial institution holds cash, securities, commodities or other financial assets on behalf of the person giving the power;
6. a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity in his or her capacity as such;
7. a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, declaration of condominium, condominium bylaws, condominium offering plan or other agreement or instrument governing the internal

7 See generally White Paper; see also Press Release, New York State Bar Association, "State Bar Commends Governor Paterson and the Legislature for Heeding Concerns Raised by Its Power of Attorney Task Force" (Aug. 15, 2010) ("Press Release"), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/HTMLDisplay.cfm&ContentID=41551> (last visited Sept. 8, 2010).

8 See Press Release. For a copy of the Working Group's Report, see <http://www.nysba.org/POAReport>.

9 See 2010 N.Y. Laws ch. 340 (Aug. 13, 2010).

affairs of an entity authorizing a director, officer, shareholder, employee, partner, limited partner, member, unit owner, manager or other person to take lawful action relating to such entity;

8. a power given to a condominium managing agent to take action in connection with the use, management and operation of a condominium unit;
9. a power given to a licensed real estate broker to take action in connection with a listing of real property, mortgage loan, lease or management agreement;
10. a power authorizing acceptance of service of process on behalf of the principal; and
11. a power created pursuant to authorization provided by a federal or state statute, other than this title, that specifically contemplates creation of the power, including without limitation a power to make health care decisions or decisions involving the disposition of remains.¹⁰

These broad exclusions should relieve concerns about the need for most business transactions to comply with the New York requirements.

A power of attorney in connection with any of the foregoing transactions or by any legal, governmental or commercial entity may (but is not required to) use a statutory short form power of attorney or a nonstatutory power that complies with the amended law.¹¹ The 2010 Amendments also clarify that “[n]othing in the statute shall be construed to bar the use or validity of any other or different form of power of attorney desired by a person other than a principal,” *i.e.*, a covered individual.¹²

No Automatic Revocation

The 2010 Amendments eliminate the presumption under the prior law that execution of a power revokes all prior powers unless expressly provided to the contrary.¹³ Because the 2010 Amendments are retroactive, powers that did not include an express no-revocation statement are deemed not to have effected any such revocation.

Clarification of Applicable Fiduciary Duty Standards

The prior law imposed a standard of care for the agent, explicitly providing that the agent owes fiduciary duties to the principal when acting pursuant to the power of attorney. While that provision with certain clarifications is still in effect,¹⁴ the retroactive exclusion of the business, commercial and real estate powers listed above effectively excepts such powers from any heightened fiduciary standards (unless otherwise imposed by law or agreed by the parties).

10 GOL § 5-1501C. Further, based on the definition of “Principal,” powers of attorney signed by a person acting as a “fiduciary or as an official of any legal, governmental or commercial entity” are also excluded from the provisions of the statute. *Id.* § 5-1501(2)(k).

11 *Id.* § 5-1501C, last para.

12 *Id.* §§ 5-1501B-4, 5-1501(2)(k).

13 *Id.* § 5-1511(6).

14 *Id.* § 5-1505. For example, the prior law provided that the agent may not transfer the principal’s property to himself or herself without specific authorization and the 2010 Amendments specify that the authorization must be “in a power of attorney.” *Id.* § 5-1505(2)(a)(2).

Recognition of Powers Executed in Other Jurisdictions

Under the prior law, all powers executed in the State of New York by an individual were required to comply with the statute — regardless of whether the power was governed by the law of another jurisdiction. This is still the case for powers covered by the statute executed in New York by individuals domiciled in New York. However, powers specifically excluded by the 2010 Amendments, such as business, commercial and real estate powers, may be governed by the law of another jurisdiction even if executed in New York.

With respect to powers covered by the statute, the 2010 Amendments clarify that a power executed in another jurisdiction in compliance with its law or the law of New York is valid in New York (regardless of whether the principal is a New York domiciliary). In addition, a power that complies with New York law and is executed elsewhere by a New York domiciliary is valid in New York. A power executed in New York by a domiciliary of another jurisdiction in compliance with the law of such jurisdiction or the law of New York is also valid in New York.¹⁵

Other Amendments

In addition to the amendments described above, the following are other highlights from 2010 Amendments:

- In the absence of a “Statutory Gifts Rider” or “SGR” (known as the “Statutory Major Gifts Rider” or “SGMR” under the prior law), gifts by the agent acting pursuant to the power are limited to \$500 in the aggregate, per year. To be valid, the SGR must be notarized and witnessed by two disinterested witnesses, and the 2010 Amendments clarify that the notary can serve as one of the witnesses.¹⁶
- For powers by individuals required to comply with the notice requirements of the statute, the exact wording requirements have been relaxed. As amended, wording mistakes (such as spelling, punctuation or formatting) or the use of bold or italic fonts shall not invalidate a power or SGR.¹⁷ However, the wording of the notices in the statute governs (and not that of the executed form).
- The 2010 Amendments clarify that although termination of an agent’s authority is not effective as to the agent until the agent has received such revocation, the revocation is deemed received within a reasonable time after a principal delivers notice to the agent in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent’s last known address.¹⁸

¹⁵ *Id.* § 5-1512.

¹⁶ *Id.* § 5-1514(9). The Law Revision Commission (the “Commission”) submitted on September 1, 2010 to the Governor and the Legislature a preliminary report of its findings, conclusions and recommendations regarding the SGR. Commission, Report on the Statutory Gifts Rider to Powers of Attorney (Sept. 1, 2010) (the “SGR Report”), available at <http://www.lawrevision.state.ny.us/reports/reviseSeptember1report.pdf>. The Commission is also required to submit, by January 1, 2012, its full report on all aspects of the implementation of the statute. See 2010 N.Y. Laws ch. 340 § 30.

¹⁷ GOL § 5-1501(2)(n), (o).

¹⁸ *Id.* § 5-1511(5)(b). Similarly, the 2010 Amendments remove the requirement that revocation also required delivery of a written, signed and dated notice to any third party that the principal had reason to believe had received, retained or acted upon the power. See *id.* § 5-1511(3)(b).

Validation of Powers under Prior Law and Effective Dates

Effective September 12, 2010, the amended law shall be deemed to have been in effect since September 1, 2009. However, notwithstanding the effective date, any statutory short form power and any SGR executed after August 31, 2009 in accordance with the law shall remain valid as will any revocation of a prior power that was delivered to the agent before the effective date.¹⁹ This retroactive effect validates powers that did not comply with the prior statute but are now excluded from its requirements.

Conclusions

The Law Revision Commission continues to study the new statute and its Final Report is due January 1, 2012.²⁰ The Legislature may consider additional amendments and clarifications, *e.g.*, the possible elimination of the SGR requirement.²¹ However, the 2010 Amendments should alleviate most of the current concerns under New York law regarding standard powers of attorney used in the vast majority of business and commercial transactions. Powers executed by individuals in connection with personal financial and estate planning continue to be subject to the statute and must comply with its requirements.

19 See 2010 N.Y. Laws ch. 340 § 31.

20 *Id.* § 30.

21 See NYSBA Memorandum in Support of Legislation (May 13, 2010), *available at* <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=41449>; see also SGR Report at 16 (postponing determination on issues relating to SGR and powers generally until further analysis and research is undertaken in connection with the Commission's Final Report).