

September 25, 2009

## New York Adopts Changes to Power of Attorney Law

Effective September 1, 2009, the State of New York changed the requirements regarding Powers of Attorney executed by individuals in New York. As currently written, the changes affect Powers of Attorney obtained by corporations, trusts, joint ventures, partnerships, limited liability companies, and other types of entities *from* their corporate officers. It does not affect Powers of Attorney *executed by* entities such as corporations, trusts, joint ventures, partnerships or limited liability companies.

### Executive summary

The amendments to the Power of Attorney law:

- Require specified language to any Power of Attorney be included for both the principal and agent.
- Require compliance for any Power of Attorney executed within the State of New York.
- Apply to Powers of Attorney contained within documents and agreements such as loan and financing agreements, limited liability operating agreements, fund operating agreements, subscription agreements and partnership agreements.
- Require that any Power of Attorney contain a notary acknowledgment.
- Impact the traditional form of Power of Attorney often contained in public company registration statements for director signatures.

### Discussion

The new law applies not only to stand-alone Powers of Attorney but also to Powers of Attorney included in other legal documents, such as financing and security agreements, partnership agreements and SEC filings such as registration statements. Further, the required changes to Powers of Attorney will be applicable in the private and registered fund context. Many fund operating, subscription, transfer and related documents include Powers of Attorney provisions, and the changes impact those documents.

The new requirements (set forth in General Obligations Law Section 5-1501B) do not make invalid Powers of Attorney issued prior to September 1, 2009 or Powers of Attorney executed outside of New York in compliance with the laws of the state in which they are executed. A Power of Attorney executed outside of the State of New York by a New York resident will be valid if it is executed in compliance with the jurisdiction in which it was executed.

The new law sets forth changes in language as well as format and creates a new short form statutory Power of Attorney, *a copy of which is annexed*. The new form requires that it be executed by both the principal and the agent, and the execution of a Power of Attorney will revoke all other Powers of Attorney previously executed. The short form is not a required form, but all Powers of Attorney must contain the exact wording of a cautionary statement to the principal<sup>1</sup> and a notice to the agent<sup>2</sup>, as they appear in the new law.

The new law also requires Powers of Attorney to comply with certain other mechanical requirements to be valid:

- the Power of Attorney must be typed or printed using letters which are “legible” and of at least 12 point in size;
- the signatures of the principal and the agent must be notarized; and
- the Power of Attorney will not become effective until the agent executes the power.

Third parties must honor statutory short form Powers of Attorney unless they have reasonable cause not to, and the fact that the form does not accord with the third party’s form is presumptively unreasonable. The exclusive remedy for failure to do so is a special proceeding under General Obligations Law section 5-1510. Other forms of Powers of Attorney may be utilized under certain circumstances, but this new law will not require compliance with such powers by third parties.

As written, the new law does not include any exemption for individuals executing a Power of Attorney in connection with a statutory filing, such as when directors of a publicly held company execute a Power of Attorney in a registration statement being filed with the SEC. Issuers with New York based individuals may want to consider removing from pending or future filings the Power of Attorney language which may have been sufficient in the past, and instead use an alternate form for those New York based individuals who will be signing the filing. The separate Power of Attorney should be filed as an exhibit to the filing.

For more information, please contact either of the following members of the [Securities/Capital Markets](#) and [Investment Funds](#) practice groups.

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<sup>1</sup> The exact text is as follows:

“(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the “principal,” you give the person whom you choose (your “agent”) authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority. When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. “Important Information for the Agent” at the end of this document describes your agent’s responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney by executing this Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a “Health Care Proxy” to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, [www.senate.state.ny.us](http://www.senate.state.ny.us) or [www.assembly.state.ny.us](http://www.assembly.state.ny.us).

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.”

<sup>2</sup> The exact text is as follows:

“(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

- (1) act according to any instructions from the principal, or, where there are no instructions, in the principal’s best interest;
- (2) avoid conflicts that would impair your ability to act in the principal’s best interest;
- (3) keep the principal’s property separate and distinct from any assets you own or control, unless otherwise permitted by law;
- (4) keep a record of all receipts, payments, and transactions conducted for the principal; and
- (5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal’s name and signing your own name as “agent” in either of the following manner:

(Principal’s Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal’s Name).

You may not use the principal’s assets to benefit yourself or give major gifts to yourself or anyone else unless the principal has specifically granted you that authority in this Power of Attorney or in a Statutory Major Gifts Rider attached to this Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal’s best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal’s guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent:

The meaning of the authority given to you is defined in New York’s General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.”