

August 19, 2010

## Amendments to New York's Power of Attorney Law

On August 15, 2010, Governor Patterson signed into law amendments to the section of New York's General Obligations Law relating to the validity, use and standards of oversight for powers of attorney executed by individuals in the state of New York that was previously revised in September 2009. The amendments except from the definition of "power of attorney" certain commercial and business powers of attorney and remove the presumption that a new power of attorney automatically revokes any existing powers of attorney.

### The September 2009 Revisions

Effective September 1, 2009, sections of New York's General Obligations Law relating to the validity, use and standards of oversight for powers of attorney executed by individuals in the state of New York were revised (the "2009 Revisions"). The stated goal of the 2009 Revisions was to prevent principals from delegating powers without fully recognizing the scope of those powers and to discourage fraudulent behavior by agents, while maintaining sufficient flexibility to allow an agent to carry out the principal's reasonable intentions; however, in practice, certain portions of the 2009 Revisions proved to be problematic because they covered such a broad range of transactions.

In particular, the 2009 Revisions applied on their face both with respect to business and commercial transactions and with respect to financial and estate planning. Additionally, under the 2009 Revisions any new power of attorney executed after September 1, 2009 automatically revoked any and all prior powers of attorney executed by the principal, unless the principal expressly provided otherwise.

### The August 2010 Amendments

The amendments signed into law on August 15, 2010 (the "2010 Amendments") attempt, among other things, to address these two concerns.

First, the 2010 Amendments specify that the following delegations of authority are not "powers of attorney" to which the law applies:

- "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 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 [the specific title of the New York General Obligation Law], that specifically contemplates creation of the power, including without limitation a power to make health care decisions or decisions involving the disposition of remains.”

Second, the 2010 Amendments modify the statutory short form power of attorney so that a new power of attorney does not automatically revoke any existing powers of attorney unless the person executing such power of attorney affirmatively makes such revocation.

The amendments become effective on September 14, 2010 but will be deemed effective on and after September 1, 2009.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.