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A legal update from Dechert's Financial Services Group

New York State Enacts Changes Impacting the Creation and Potential Uses of Powers of Attorney

Overview

On September 1, 2009, broad changes to the laws governing powers of attorney became effective in the State of New York.[1] These changes impact both the creation and potential uses of powers of attorney and apply not only to New York residents, but also to individuals who execute powers of attorney while conducting business in New York.

The revised law has wide implications. The revised law does not provide for an exclusion for commercial transactions; thus, it appears to govern all powers of attorney that are executed by individuals in New York, including those that may be incorporated into other documents such as limited partnership agreements and limited liability company operating agreements, or granted in connection with registration statements and other filings made with the Securities and Exchange Commission (the "SEC").

Scope of the Revised Law

The revised law applies only to powers of attorney executed in New York by individuals on or after September 1, 2009 (the "Effective Date"). Powers of attorney executed in another state, in compliance with the laws of that state or those of New York, are valid in New York, even if the principal is a domiciliary of New York.[2] Under the revised law, powers of attorney created after the Effective Date will be durable, meaning that the power of attorney will remain in effect notwithstanding the principal's incapacity, unless stated otherwise.[3]

Powers of attorney executed by institutions are not affected by the revised law. Valid powers of attorney executed by individuals before the Effective Date will continue to be valid. However, powers of attorney executed by individuals on or after the Effective Date will automatically invalidate all prior ones executed by the principal, unless stated otherwise, even if the newly executed power of attorney is for a specific or limited purpose. To address this, on June 15, 2009, a technical corrections act was passed in the New York State Assembly revising the revised law so that subsequently executed powers of attorney would not automatically revoke all those previously executed.[4] This act has yet to pass in the New York State Senate.

Creation of a Valid New York Power of Attorney

To create a valid power of attorney, individuals must follow the requirements imposed by NYGOL §5-1501B. The power of attorney must be printed or typed using a legible font no less than 12 points in size. The instrument must also be executed and dated by both the principal and agent, with each signature acknowledged by a notary. It is not required that both the principal and agent execute the instrument at the same time or in the presence of each other, nor will a lapse of time between the acknowledgements of the signatures of the

1 Article 5, Title 15 of the New York General Obligations Law ("NYGOL") was amended on January 29, 2009. The effective date of the revised law was originally scheduled for March 1, 2009. However, on February 25, 2009, the Governor of New York signed into law a bill that extended the effective date to September 1, 2009.

2 NYGOL §5-1512.

3 NYGOL §5-1501A.

4 New York State Assembly Bill A8392A.

principal and the agent invalidate the instrument.[5] There is no specific language in the revised law requiring the principal and agent to follow a certain order when signing a power of attorney, but the power of attorney will not be deemed valid until the agent's signature is acknowledged. All powers of attorney must contain the exact wording of the cautionary statement to the principal[6] and notice to the agent[7] as they appear in the revised law.[8] The cautionary statement alerts the principal as to the authority that the principal is granting to the agent, and the notice describes the agent's role and duties (including fiduciary obligations), and potential consequences for violating such duties. The notice to the agent codifies the common law recognition of an agent as a fiduciary.[9]

Implications

While the discussion in the legislative history relating to the enactment of the revised law and the ensuing comments mostly centered around issues relating to trusts

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5 NYGOL §5-1501B.

6 "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 or 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."

7 "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 or 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."

8 NYGOL §5-1501B, NYGOL §5-1513(1)(a), and NYGOL §5-1513(1)(n).

9 The New York State Law Revision Commission. 2008 Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney. Page 7.

and estates and elder law practices,[10] the plain language in the revised law does not include limitations and therefore should be read to apply to all powers of attorney that are executed by individuals in New York. Although the legislative history recognized that these instruments are used in a variety of circumstances,[11] there have been unforeseen implications in the business and commercial context.

For example, powers of attorney used in commercial settings are often not stand-alone documents, but rather may be incorporated into other documents. Hedge funds and private equity funds and their investors, for example, are governed by limited liability company operating agreements or partnership agreements and subscription agreements that include powers of attorney. Such funds typically may have investors that reside in states other than New York, which can result in difficulties when trying to fulfill the requirements of the revised law. For example, while investors are typically given copies of the same document for execution, the requirements of the revised law (e.g., including the cautionary statement to the principal and the notice to the agent) may lead to the creation of separate versions of documents for New York residents. Furthermore, since powers of attorney are not valid until the agent's signature is notarized, there could be delays or uncertainty as to the effective date of such agreement and/or the date that an investor is deemed admitted to the fund, if the principal and agent execute and notarize the agreement on different dates. In addition, there is concern that if a power of attorney included within an agreement is not validly executed, this might invalidate the entire agreement. These issues also may arise with other documents, such as financing and security agreements and may impact opinions rendered in connection with such transactions.

Registered investment companies and other public companies that have shares registered under the Securities Act of 1933, as amended (the "Securities Act"), and the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which include foreign issuers with U.S. shareholders, will also face difficulties when attempting to meet the requirements of the revised law. For example, in connection with shareholder meetings, shareholders often grant powers to vote their shares via proxies. Based on the definitions of "agent"[12] and "power of attorney"[13] in the revised law, as well as general principles of agency law[14], it appears that any proxy may qualify as a "power of attorney" for purposes of the revised law and thus is subject to the revised law's requirements, even if the proxy language does not explicitly state that a shareholder designates an individual as its "attorney-in-fact." Requiring a shareholder to have the grant of its proxy notarized would be a burdensome process for retail shareholders, who are already at risk not to vote. Moreover, the notarization requirement of the revised law would make it impossible for New York shareholders to grant their powers electronically and effectively bar these shareholders from taking advantage of the convenience of the electronic process. Further, many issuers may have limited contacts with New York (other than one or more New York domiciled shareholders) and may be unaware of the revised law, and thus would be unlikely to include the language required under the revised law in proxies sent to shareholders. The cumulative result is that the revised law, unless amended, could cause the disenfranchisement of a significant number of New York shareholders of registered investment companies or other public companies.

Directors who sign registration statements often do so through the grant of a power of attorney. If any of the signatories fail to meet the requirements of the revised law, the registration statement may be deemed by the SEC to have been improperly filed. This situation could arise regularly, since Rule 483(b) under the Securities Act has been interpreted by the staff of the SEC to require that a power of attorney specifically relate to a particular registration statement filing, and concerns in this regard are typically satisfied by having a power of attorney updated yearly in the case of registered investment companies that must annually update their registration statements. Similar concerns may arise in connection with filings required under the Exchange Act on Forms 3, 4 and 5,[15] which can be signed by agents to whom the principals may grant powers.

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10 The New York State Law Revision Commission. 2008 Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney. Pages 21-22.

11 The New York State Law Revision Commission. 2008 Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney. Page 5.

12 NYGOL §5-1501(1).

13 NYGOL §5-1501(10).

14 See Restatement (3rd) of Agency (2006) §1.04(7).

15 Form 3 requires the disclosure of beneficial ownership of securities, if any, by each reporting person of a registrant. Forms 4 and 5 require disclosure of any changes in beneficial ownership of securities by a reporting person of a registrant.

The above examples, while not exhaustive, illustrate various challenges posed by the requirements of the revised law that may not have been foreseen when it was enacted.

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