

RECENT CHANGES TO THE NEW YORK POWER OF ATTORNEY LAW

Powers of attorney are commonly used in the asset management business, including in private funds and other investment arrangements, to facilitate efficient operations. Effective September 1, 2009, Title 15 of Article 5 of the New York State General Obligations Law (“Title 15”) governing statutory short form powers of attorney was changed in several ways, including by extending some of the new requirements of the statutory short form to other, non-statutory powers of attorney executed by individuals in the State of New York. The law does not apply to powers executed by entities. While the title of Title 15 has been changed from “Statutory Short Form Power of Attorney” to “Statutory Short Form and Other Powers of Attorney for Financial Estate Planning,” what constitutes financial estate planning is nowhere defined in the statute and the terms of the law are otherwise quite broad. For example, a power of attorney is defined as a “written document by which a principal with capacity designates an agent to act on his or her behalf.” This definition could potentially cover many grants of authority by an individual appointing an agent to act on his or her behalf, including in a commercial context. As a result, the new law has created considerable uncertainty with respect to powers of attorney executed by individuals in New York.

I. New Title 15 Requirements for Non-Statutory Powers of Attorney

In addition to making substantial alterations to the New York statutory short form power of attorney, the new law applies several new requirements to non-statutory powers of attorney. The new requirements for a non-statutory power of attorney are as follows:

- The power of attorney must be in twelve-point font or the equivalent size if handwritten;
- The power of attorney must be signed and dated by *both* the grantor of the power of attorney and the agent to whom the power of attorney is granted (though not necessarily at the same time);
- The signatures of *both* parties must be notarized; and
- The cautionary legends set forth in the statutory short form power of attorney must be included in every non-statutory power of attorney subject to Title 15 (see Exhibit I to this memorandum for the current version of the legends). These legends are intended to inform the grantor of both the scope and the limitations of the powers that may be granted under a power of attorney and to alert the recipient of the power of attorney of its fiduciary duties and of the potential liability for failing to perform those duties. While many of the provisions included in these legends may not seem relevant to a power of attorney granted for a limited purpose with respect to investments, the new law requires that they be included verbatim in every power of attorney subject to Title 15. Notably, the cautionary legends contemplate only powers that are revocable.

If the authority granted includes the power to make certain gifts and transfers of property, further formalities are required. Additionally, the new law requires that when signing on behalf of the principal, the agent must indicate that it is signing as agent for the principal or otherwise provide similar written disclosure of the principal and agent relationship.

Under the new law, powers of attorney entered into prior to September 1, 2009 will still be valid and effective. Moreover, powers of attorney entered into outside of New York that comply with the laws of the jurisdiction in which they are executed will be valid in New York. Conversely, it is important to note that the law applies if the power is executed while an individual is physically in New York State, whatever his or her domicile. The ability of third parties to refuse to accept a statutory short form power of attorney is also limited by the new law.

II. Revocation of Prior Powers of Attorney

One major change in Title 15 is in the manner in which prior powers of attorney may be revoked by the grantor of such power of attorney. The new law provides that each time the grantor of a prior power of attorney enters into a new power of attorney, *all* prior powers of attorney of the grantor will automatically be revoked unless the subsequent power of attorney specifically provides that it is not intended to revoke any prior powers of attorney. This is true whether the grantor of the prior power of attorney is entering into a new power of attorney with the same agent or with a new agent and even if the subject matter of the authority is different. Amendments to the new law have been introduced in the New York State Legislature that would reverse the automatic revocation provision so that prior powers would not be automatically revoked by the execution of a subsequent power of attorney. However, as of the date of this memorandum, these amendments have not been passed into law. Unless or until such amendments are adopted, parties entering into or relying on powers of attorney should be mindful of the risk of inadvertent revocation.

III. Fiduciary Duties of Agent

In addition to the changes described above, the new law codifies the fiduciary duties and the standard of care that the recipient of a power of attorney owes to the grantor of such power of attorney. The provisions relating to fiduciary duties apply retroactively to any powers of attorney entered into prior to the effective date of the statute. The standard of care to be observed is the standard of care that would be observed by a prudent person when dealing with the property of another. Among the newly codified fiduciary duties are (i) to follow the grantor's instructions or act in the grantor's best interest in the absence of instructions; (ii) to avoid conflicts of interest; (iii) to segregate any property of the grantor that is not jointly owned by the grantor and recipient of the power of attorney; and (iv) to keep proper records and disclose them to the relevant parties under certain circumstances. The new law also provides for the appointment of an optional monitor who may obtain such records.

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Given the current uncertainty, the utility of obtaining a power of attorney executed by an individual who may execute the power while in New York should be weighed against the issues raised by the recently enacted legislation. An analysis should be made as to whether it may be

possible to accomplish an act usually accomplished by using a power of attorney through another means. For example, rather than using a power of attorney to sign an investment fund agreement on behalf of the investor, the signature page to the fund agreement could be included in the subscription package and signed directly by the investor.

If a decision is made to continue using a power of attorney despite the additional burdens imposed by the new legislation, all such powers of attorney must be updated to include the necessary legends and signature blocks. In addition, all powers of attorney should specifically state that they are not intended to revoke any prior power of attorney (unless that in fact is the intent).

We recommend consulting with counsel regarding obtaining or using any powers of attorney that may be executed by an individual while the individual is in New York State.

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EXHIBIT I
Cautionary Legends

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.

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.