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New York Power of Attorney Law Amended

Summary

On August 15, 2010, Governor Paterson signed into law a technical corrections bill amending New York's power of attorney law (the "2010 Amendments").¹ The 2010 Amendments will resolve a number of issues created by the enactment of sweeping changes to Title 15 of New York's General Obligations Law in January 2009 (the "2009 Law"). Specifically, the 2010 Amendments will create broad exemptions for certain commercial and business transactions. The 2010 Amendments, which become effective on September 12, 2010, will apply retroactively to September 1, 2009, the date the 2009 Law took effect.

Background

The 2009 Law was passed in response to abuses of powers of attorney, especially in the elder-care context. Advocates argued that elderly, and sometimes infirm, individuals were susceptible to signing such instruments without fully understanding their implications and were, therefore, vulnerable to fraud. The 2009 Law, which was intended to combat such abuses, mandated the inclusion, word-for-word and within certain formatting constraints, of prescribed text in any power of attorney entered into in New York. These

passages provide clear warnings to potential principals and outline the duties of agents under powers of attorney. More importantly, no power of attorney entered into in New York could be valid without the inclusion of those two provisions.

While the motivations behind the 2009 Law were admirable, it had unintended consequences. Because powers of attorney covered by the statute were not clearly limited to the financial and estate planning setting, all New York powers of attorney, including commercial and business transactions, were potentially subject to the new requirements. This ambiguity, combined with the fact that powers of attorney are used regularly in business transactions (e.g., proxies, LLC agreements, security agreements and real estate transactions) created widespread concerns that any such transaction could be invalidated if the relevant documents did not contain the language mandated by the 2009 Law.

2010 Amendments

To clarify the scope of the 2009 Law, the New York state legislature passed the 2010 Amendments, which Governor Paterson has now signed into law. Once they take effect, commercial and business transactions will be exempted from the requirements of the 2009 Law. The 2010 Amendments exclude the following from the purview of the 2009 Law:

¹ New York General Obligations Law 5-1501 et seq. (NY-GOL 5-1501)

- a power of attorney given primarily for a business or commercial purpose, including:
 - a power that is coupled with an interest in the subject of the power (e.g., a consignment agreement);
 - a power given to or for the benefit of a creditor in connection with a loan or other credit transaction; or
 - a power given to facilitate transfer of stocks, bonds or other assets (e.g., a stock power).
- a proxy or other delegation to exercise voting rights or management rights;
- a power created on a form prescribed by a government or governmental agency for a governmental purpose;
- a power authorizing a third party to prepare, execute, deliver, submit and/or file a document or instrument with a government or governmental agency (e.g.,
 - a power authorizing an agent to make a principal company's tax filings);
 - a power authorizing a financial institution or its employees to take action with respect to customer accounts;
 - 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 or other legal or commercial entity;
 - a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust or other agreement or instrument governing the internal affairs of an entity authorizing a director, officer, shareholder, employee, partner, limited partner or other person to take lawful action relating to such entity;
- a power authorizing acceptance of service of process on behalf of the principal; and
- a power created pursuant to authorization provided by a federal or state statute, other than the New York power of attorney 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.

As noted above, the 2010 Amendments will be effective as of September 12, 2010, and will apply retroactively to September 1, 2009. The short form power of attorney included in the 2010 Amendments has also been amended so that an existing power of attorney will not be superseded by a new short-form version unless the principal expressly makes such a revocation upon execution.

If you have any questions regarding the 2010 Amendments, please feel free to contact any Hunton & Williams attorneys listed in this alert.