

Client Alert

Corporate Department

August 2010

Retroactive Amendment to Clarify New York Power of Attorney Law

Last year Article 5, Title 15 of the New York General Obligations Law was amended, significantly changing the requirements for powers of attorney executed in the State of New York. The revised 2009 statute imposed anomalous and unintended requirements on numerous commercial and securities transactions in which powers of attorney (and similar instruments) were used. A corrective amendment has now been passed to resolve the concerns regarding the overly broad definition given to “power of attorney.” The amendment will become effective on September 13, 2010, and apply retroactively to all powers of attorney signed on or after September 1, 2009.

The amendment exempts from the requirements of the revised 2009 statute, “a power of attorney given primarily for a business or commercial purpose.” Such exempted powers of attorney include:

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 Title 15 of the New York General Obligations 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 the amendment applies retroactively, exempted powers of attorney signed on or after September 1, 2009 that did not comply with the requirements of the revised 2009 statute will now become valid.

Additionally, the revised 2009 statute included the presumption that the execution of a power of attorney would revoke any prior powers of attorney. The amendment repeals this presumption. The execution of a power of attorney will not revoke prior powers of attorney, unless such revocation is expressly stated.

Please feel free to contact the Partners listed below or any Corporate or Real Estate Partner with whom you regularly work, if you would like to discuss the amendment and its potential effects on your operations.

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