Client Advisory

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Trusts and Estates

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# 2010 Revisions to New York Power of Attorney Statute Take Effect September 12

New York has further amended its power of attorney statute to address some of the issues caused by the sweeping changes made to the statute, which went into effect on September 1, 2009. The measure makes technical corrections to the statutory short form power of attorney and the statutory major gifts rider. These corrections do not go into effect until September 12, 2010, but, once effective, they are retroactively applicable to powers executed on or after September 1, 2009. The two most important of these technical corrections address the unintentional consequences of executing a power of attorney under the new law—namely the revocation of prior powers of attorney—and the application of the statute to powers issued in connection with business, commercial and real estate transactions.

Under the 2009 law, New York's power of attorney statute provided that powers executed on or after September 1, 2009, automatically revoked all prior powers of attorney (even those in place for limited purposes), unless the principal specifically provided otherwise. This led to the unintentional revocation of many powers of attorney by unwary principals. As a result of the technical corrections, the statutory short form power of attorney no longer automatically revokes powers of attorney previously executed by the principal, unless the principal specifically provides otherwise. As this correction was meant to address inadvertent revocations, any revocations of prior powers of attorney actually delivered to the former agent prior to September 12, 2010, remain valid.

The requirements of the 2009 power of attorney statute were originally made applicable to all powers of attorney executed within the state of New York by individuals on or after September 1, 2009, regardless of the context in which such powers were granted. This very broad application meant that the very technical aspects of the statute were made applicable to powers issued in connection with a whole host of business, commercial and real estate transactions that were never really considered customary for the types of financial planning powers of attorney the statute was meant to address. The technical corrections add a new section to the power of attorney statute (Section 5-1505C of the General Obligations Law) that excludes powers issued in connection with these "business" transactions from the application of the statute. The excluded powers include:

- a power given for a business purpose;
- a power coupled with an interest;
- a power given to a creditor in connection with a loan or other credit transaction;

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- powers given to facilitate the transfer of stocks, bonds or other assets;
- proxy powers to exercise voting or management rights;
- a power used by a governmental subdivision, agency or instrumentality;
- a power authorizing a third party to prepare and file documents with the government or other third parties;
- a power authorizing a financial institution to take action relating to an account held at the institution;
- a power given as part of a holding in a business entity or condominium;
- a power contained in a business agreement authorizing an agent to take action relating to said business;
- a power given to a condominium managing agent;
- a power given to a real estate broker;
- a power authorizing the acceptance of service of process; and
- a power created by statutes, such as a power authorizing an agent to make health care decisions or decisions regarding disposition of remains.

The technical corrections also clarify a number of ambiguities in the statute. The corrections make clear that any "person" can be named an agent, but an estate or a trust cannot serve as such. They also clarify that powers of attorney may be used to make gifts, in accordance with a preexisting pattern of gifting, of up to $500 per year in the aggregate. As originally enacted, the statute was ambiguous as to whether the $500 limit was to be applied in the aggregate or per recipient. All other gift-giving authority of any kind must still be made in a separately executed "statutory gifts rider" (which is renamed as such in the technical corrections from the original "statutory major gifts rider"), which must be executed simultaneously with the short form power of attorney in order to be effective. Finally, the corrections also explicitly provide that the notary acknowledging the principal's signature on a statutory gift rider can also serve as one of the two witnesses.