

August 27, 2009

Changes to New York Power of Attorney Law

New York Imposes New Requirements on All Powers of Attorney Executed in New York by Individuals Effective September 1, 2009

SUMMARY

Effective September 1, 2009, all powers of attorney executed in New York by individuals must include a prescribed “cautionary” statement to the principal and notice to the agent, and be signed by both the principal and the agent and acknowledged by them before a notary public. The cautionary statement to the principal and notice to the agent must contain the exact wording of those provisions as they appear in an amendment to New York’s General Obligations Law.

The new law will not affect the validity of any power of attorney executed by an individual in New York prior to September 1, 2009, but the execution of a power of attorney in New York by an individual after that date will automatically revoke any and all prior powers of attorney, unless the new power provides otherwise. The new law applies only to powers executed in New York by individuals. Powers executed in another state in compliance with the laws of that state are valid in New York, regardless of whether the principal is a domiciliary of New York, and powers executed by entities are not subject to the new law.

REQUIREMENTS FOR CREATION OF A VALID POWER OF ATTORNEY

Section 5-1501B of the General Obligations Law imposes new requirements for the creation of a valid power of attorney and applies to all powers of attorney, both statutory and non-statutory, executed in New York by an individual after September 1, 2009.¹ All such powers of attorney must contain the exact wording of a cautionary statement to the principal² and a notice to the agent,³ as they appear in the new law. These statements provide notice to the principal of the extensive power the principal is granting to the agent, and describe the agent’s duties to the principal and warn the agent of the consequences of violating those duties.

SULLIVAN & CROMWELL LLP

The new law also requires powers of attorney to comply with certain other mechanical requirements to be valid:

- the power of attorney must be typed or printed using letters which are “legible” and of at least 12 point in size;
- the signatures of the principal and the agent must be notarized; and
- the power of attorney will not become effective until the agent executes the power.

Some of the legislative history of the new law could be read to imply that the new law was not intended to apply to powers of attorney used in commercial or business transactions as opposed to financial or estate planning transactions. On its face, however, the new law applies to all powers of attorney executed in New York by individuals. Unless and until this ambiguity is clarified, it is advisable to comply with the new law.

SCOPE OF THE NEW LAW

The new law applies only to powers executed in New York by individuals. Powers executed in another state in compliance with the law of that state are valid in New York, regardless of whether the principal is a domiciliary of New York.⁴ Powers executed by institutions are not subject to the new law.⁵

The new law will not affect the validity of any power of attorney executed prior to September 1, 2009 if such power was valid at the time of its execution. The execution of a new power of attorney after September 1, however, will automatically revoke any and all prior powers of attorney executed by the principal. A technical corrections act currently pending in the New York State Legislature would revise the new law so that subsequently executed powers would not revoke all previously executed powers of attorney. Unless and until the technical corrections bill is enacted, however, it would be advisable for any power of attorney subject to the new law expressly to provide that the power does not revoke any prior powers of attorney in order to avoid inadvertent revocations of existing powers of attorney.

IMPLICATIONS

Powers of attorney are used in a wide variety of contexts. The new law appears to apply not only to stand-alone powers of attorney but also to powers of attorney included in other legal documents, such as financing and security agreements and partnership agreements. The requirements of the new law should be taken into account in connection with any such other documents that may be executed in New York by individuals to ensure that powers of attorney granted therein after September 1, 2009 will be valid and effective.

* * *

ENDNOTES

¹ Article 5, Title 15 of the New York General Obligations Law was amended on January 29, 2009, with an original effective date of March 1, 2009, which was later extended to September 1, 2009.

² The exact text is as follows:

“(a) 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.”

³ The exact text is as follows:

“(n) 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

(continued . . .)

ENDNOTES

(. . . continued)

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."

4 Revised N.Y. Gen. Oblig. Law § 5-1512.

5 This would include a power of attorney executed by any corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, government agency, government entity, government instrumentality, public corporation, or any other legal or commercial entity.

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance and corporate transactions, significant litigation and corporate investigations, and complex regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 700 lawyers on four continents, with four offices in the U.S., including its headquarters in New York, three offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Jennifer Rish (+1-212-558-3715; rishj@sullcrom.com) or Alison Alifano (+1-212-558-4896; alifanoa@sullcrom.com) in our New York office.

CONTACTS

New York

James I. Black III	+1-212-558-3948	blackj@sullcom.com
Robert E. Buckholz, Jr.	+1-212-558-3876	buckholzr@sullcrom.com
Charles T. Dowling	+1-212-558-3845	dowlingc@sullcrom.com
Robert W. Reeder III	+1-212-558-3755	reederr@sullcrom.com
