

# ADVISORY

## SULLIVAN & WORCESTER LLP CLIENT ADVISORY

### Changes to Statutory Form of Power of Attorney in New York State

On January 27, 2009, Governor David Paterson signed into law significant revisions to New York State's General Obligations Law ("GOL") governing the use of powers of attorney.

The revisions enacted by New York aim to fill in gaps in the GOL and clarify several perceived ambiguities resulting in more oversight and a clearer understanding of which actions are permissible and which actions are not regarding the use of powers of attorney. The new law becomes effective March 1, 2009 but legislation is currently pending to delay the effective date until September 1, 2009.

#### MAJOR REVISIONS

Here is a summary of the major changes and clarifications that were adopted by New York:

(1) the agent being granted the power must now sign the power of attorney and his or her signature must be acknowledged in the same manner prescribed for the acknowledgment of a conveyance of real property. The power is not effective until the agent signs;

(2) the power of attorney is not invalid solely because there has been a lapse of time between the date of the acknowledgment of the signature of the principal and date of the acknowledgment of signature of the agent or because the principal became incapacitated during any such lapse of time;

(3) a grant of authority to make major gifts and other asset transfers must be set out in a statutory major gifts rider ("SMGR") to authorize major gifts (gifts in excess of \$500.00). The short form power of attorney and the SMGR must be read together as a single instrument. The SMGR must be signed and dated by a principal, who must have capacity, while the principal's signature must be acknowledged in the manner prescribed for the acknowledgment of a conveyance of real estate, witnessed by two persons who are not named as permissible recipients of gifts. The SMGR must be executed by the principal simultaneously with the short form power of attorney. These changes are meant to alert the principal to the gravity of granting the agent this type of authority;

(4) the power of attorney continues in effect following the incapacity of the principal unless it expressly provides that it is terminated by the incapacity of the principal;

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(5) the power of attorney terminates when the principal dies or the agent dies or becomes incapacitated and there is no co-agent or successor agent willing or able to serve;

(6) the term "health care billing and payment matters" has been added to the term "records, reports and statements" in the GOL so that the agent can examine, question, and pay medical bills in the event that the principal intends to grant the agent power with respect to records, reports, and statements;

(7) a principal may appoint a monitor or monitors in the power of attorney who shall have the authority to request, receive and compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal, to request and receive such records held by third parties, and to request and receive a copy of the power of attorney;

(8) unless specifically set forth in the power of attorney, an agent is not entitled to receive compensation from the assets of the principal for the responsibilities performed under a power of attorney, but is entitled to receive reimbursement for reasonable expenses incurred in connection with his or her duties;

(9) a principal may designate two or more persons to act as co-agents. Unless the principal provides otherwise in the power of attorney, the co-agents must act jointly;

(10) it is unreasonable for third persons to refuse to accept a properly executed power of attorney because it is not a form prescribed by such third party; and

(11) where the power of attorney has been recorded pursuant to New York's Real Property Law, the principal who is revoking the power of attorney must also record a written revocation. Notwithstanding the recording of a revocation, a third party must have actual notice of the revocation in order for it to be effective.

## IMPLICATIONS

The amendments to the GOL should reduce the considerable ambiguities about the proper authority and use of a power of attorney under New York law while simultaneously allowing it to be flexible enough to permit an agent to carry out the principal's reasonable intentions.

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If you would like to learn more about the issues raised by this advisory or if you have questions about the impact of these changes, please contact the attorneys listed above.