

# New York Enacts Significant Amendments to the Law Governing Powers of Attorney

December 18, 2020

New York State has enacted significant amendments (the “Amendments”) to the General Obligations Law with respect to the establishment, interpretation and acceptance of powers of attorney (“POA”). The Amendments are effective June 13, 2021 and will, among other things, remove the requirement for a Statutory Gifts Rider (“SGR”), not require a statutory short form POA to have the exact language set forth in the law, and allow damages to be recovered against third parties (such as financial institutions) who unreasonably refuse to accept a valid statutory short form POA.

## Background

In 2008, New York State overhauled the Power of Attorney requirements (“2008 Amendments”). The 2008 Amendments, among other things, created a new statutory short form POA and required the execution of an SGR in order for an agent to make gifts and to open, modify or terminate certain bank accounts. The law was subsequently amended in 2010 to address certain practical and legal issues with the 2008 Amendments. Over the past 11 years the statutory short form POA created by the 2008 Amendments has been a source of confusion and prone to improper execution.

The Amendments intend to simplify the current POA form, address a number of technical issues, and allow for damages to be recovered against third parties who unreasonably refuse to accept a valid statutory short form POA. Financial institutions will need to revise their procedures to address several changes made by the Amendments.

## Summary of Changes

### **Requires Form to Substantially Conform**

The current POA law requires a POA to contain the exact wording of the statutory short form set forth in the General Obligations Law in order for a third party to be required to accept the POA. The Amendments change this standard to “substantial conformance” with the statutory short form. Accordingly, a third party presented with a POA that substantially conforms with the wording of the statutory short form will be required to accept such POA.

The Amendments further clarify that a statutory short form “substantially conforms” to the form set forth in the General Obligations Law notwithstanding that the form contains: (i) an insignificant mistake in wording, spelling,

punctuation or formatting, or the use of bold or italic type; or (ii) uses language that is essentially the same as, but is not identical to, the statutory form, including utilizing language from a previous statute. Additionally, insubstantial variation in the wording of the “Caution to the Principal” and “Important Information for the Agent” sections of the POA no longer prevent a POA from being deemed a valid POA.

### **Damages**

Under the current law, damages are not recoverable against a third party that unreasonably refuses to accept a POA. The only existing remedy is to bring a special proceeding in court to determine whether the POA is valid and to compel acceptance.

The Amendments preserve the special proceeding remedy and add provisions to allow a court to award damages, including reasonable attorney’s fees and costs, if the court finds that a third party acted unreasonably in refusing to accept a properly-executed POA. A third party is defined as a financial institution or any person.

### **Removal of Statutory Gifts Rider**

The current law requires a POA to be accompanied by a properly executed SGR that, among other things, expressly authorizes an agent to open, modify or terminate a joint or in-trust-for (i.e., totten trust) account if the principal intends for the agent to have such authority. This separate document has been prone to improper execution given that it has different requirements than the POA form itself.

The Amendments have effectively removed the Statutory Gifts Rider in order to simplify this process. To authorize an agent to open, modify or terminate a joint or in-trust-for account, or to designate/change beneficiaries on the principal’s accounts, the principal must now expressly state that the agent has such authority in the Modifications section of the POA form.

### **Safe Harbor Provisions**

The Amendments add a few safe harbor provisions with respect to acceptance of a POA. First, the Amendments set forth that a person that in good faith accepts an acknowledged POA without actual knowledge that the signature is not genuine may rely upon the presumption that the signature is genuine. An acknowledged POA means the POA was purportedly verified before a notary public or other individual authorized to take acknowledgements.

Second, a person that in good faith accepts an acknowledged POA without actual knowledge that the POA is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority, may rely upon the POA as if it were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

Third, a person that is asked to accept an acknowledged POA may request, and rely upon, without further investigation:

- an agent's certification under penalty of perjury of any factual matter concerning the principal, agent or power of attorney; and
- an opinion of counsel as to any matter of law concerning the POA if the person making the request provides in a writing or other record the reason for the request.

Please note that an opinion of counsel that a financial institution requests in accordance with this provision will be provided at the principal's expense only if such request by the financial institution is made within 10 business days of the POA being presented for acceptance.

With respect to all of the foregoing, a person that conducts activities through employees is without actual knowledge of a fact relating to a POA, a principal, or an agent if the employee conducting the transaction involving the POA is without actual knowledge of the fact after making reasonable inquiry with respect thereto.

The Amendments also provide that once a properly-executed statutory short form POA is reasonably accepted, if a third party conducts a transaction in reliance on that POA, the third party shall be held harmless from liability for the transaction.

### **Procedure and Timeframe for Acceptance or Rejection of POA**

The Amendments have also created a new process for a third party, such as a financial institution, to accept or reject a statutory short form of POA. A third party who is presented with a statutory short form of POA has 10 business days to either accept or reject the POA, or to request an affidavit of full force and effect to be executed. If rejecting the POA, it must be rejected within 10 business days of presentation in a writing that sets forth the reasons for the rejection. The writing must be sent to the principal and the agent at the addresses on the POA and such other addresses as provided by the principal or the agent. Reasons for rejection may include, among other things, a non-conforming form, missing or wrong signature, invalid notarization, or unacceptable identification.

In the event that the statutory short form POA presented is not an original or attorney-certified copy, a third party may reject the POA for this reason, but in explaining the reason for rejection, the third party must also identify such other provisions of the POA, if any, that would otherwise constitute cause for rejection of same.

Once a third party receives a writing in response to the reasons for rejection, the third party has seven business days to either honor the POA or provide a final rejection in writing setting forth the reasons for such rejection. This rejection shall be sent to the address provided on the POA, to the address of the agent, if any, and may also be sent to such other address as shall be provided on the account documents, or to the address of the attorney as provided in an opinion of counsel provided pursuant to the Amendments.

If an affidavit of full force and effect is requested as part of the initial decision with respect to the POA, a third party shall honor the POA within seven business days of receipt of such affidavit unless reasonable cause exists to deny the POA.

If the reason for rejection of the POA is because a report has been made to the local adult protective services unit regarding possible physical or financial abuse, neglect, exploitation or abandonment of the principal, any

notices required to be provided to the agent under the Amendments cannot be sent until after a determination is made by the adult protective services unit.

## Technical Amendments

There were also a few technical amendments made to the General Obligations Law regarding POAs. They are as follows:

- If a principal is unable to sign the POA themselves, a person other than a person designated as the principal's agent or successor agent may sign, initial and date the POA on behalf of the principal provided that such person is in the principal's presence and signing at the principal's direction.
- An agent's power to make gifts in the aggregate in a calendar year is expanded from the current \$500 limit to \$5,000 without requiring modification to the POA form.
- An agent's authority with regard to financial matters related to healthcare is clarified.
- If a POA requires two or more agents to act together as co-agent, one or more agents may delegate to the co-agent the authority to conduct banking transactions if the principal initialed "(o)" in the grant of authority provisions of paragraph (f) of the statutory short form POA.

The Amendments take effect June 13, 2021, provided however, that any statutory short form POA and any SGR executed by a principal and valid at the time executed by the principal shall remain valid. Please note that in his Approval Memorandum the Governor indicated that a few chapter amendments will be forthcoming, meaning there may be further amendments or clarifications to the POA requirements. There is no timeline for when such amendments will take place, but we will continue to monitor and send out further updates once finalized.

If you have any questions regarding the new power of attorney Amendments, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at [jsimon@cullenllp.com](mailto:jsimon@cullenllp.com), Kevin Patterson at (516) 296-9196 or via email at [kpatterson@cullenllp.com](mailto:kpatterson@cullenllp.com), Elizabeth A. Murphy at (516) 296-9154 or via email at [emurphy@cullenllp.com](mailto:emurphy@cullenllp.com), or Mandy Xu at (516) 357-3850 or via email at [mxu@cullenllp.com](mailto:mxu@cullenllp.com).

Please note that this is a general overview of the issues addressed and does not constitute legal advice.

## Practices

- Regulatory and Compliance

## Attorneys

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