

June 30, 2010

Private Client & Fiduciary Services Alert



Virginia's New Power of Attorney Act

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The Virginia General Assembly recently passed Virginia's version of the Uniform Power of Attorney Act (the "Act"). The Virginia Bankers Association worked closely with the Virginia Bar Association in supporting enactment of this important piece of legislation. The Act has a July 1, 2010 effective date and applies to all powers of attorney created before, on or after that date. The Act does not affect the validity of any pre-existing power of attorney executed under prior Virginia law. This Alert will focus on those aspects of the Act that have the greatest impact on individual and corporate fiduciaries.

Durability. Under the Act, a power of attorney is durable unless it expressly states otherwise. This is a change from prior Virginia law, where a power of attorney needed to contain durability language in order to remain operational upon the disability of the principal.

Validity. One of the Act's goals is to encourage widespread acceptance of powers of attorney within and outside Virginia. To that end, the Act recognizes the validity of powers of attorney validly created under another state's law and encourages portability of powers of attorney between states. Under the Act, a photocopy of the power of attorney will be treated as an original in all cases except those where the Virginia statute requires an original. Also, a power of attorney does not become "stale" or ineffective due to a lapse of time. Unless otherwise stated in the instrument, a subsequently executed power of attorney does not revoke a previously executed instrument.

Termination of Agent's Authority. The Act provides a list of events that will terminate the agent's authority under the power of attorney. They include: (i) the principal's revocation of the agent's authority; (ii) the resignation, death or incapacity of the agent; (iii) the termination of the power of attorney itself; or (iv) unless otherwise stated in the document, the agent's and principal's divorce or annulment.

Co-Agents. Unless the document specifies otherwise, the Act permits co-agents to exercise their authority independently. Therefore, unless required to act jointly, agents will have full authority to act independently under the instrument. This can create the potential for conflicting instructions by agents, and an institution should have policies in place when taking instructions from one of two or more named agents.

Protection for Acceptance of Acknowledged Power of Attorney. In order to encourage widespread acceptance of powers of attorney, the Act provides certain protections for persons accepting acknowledged (notarized) powers of attorney. Persons who, in good faith, accept a notarized power of attorney without actual knowledge that: (i) the instrument is forged, void, invalid, or terminated; (ii) the purported agent's authority is void, invalid, or terminated; or (iii) the agent is exceeding or improperly exercising his or her authority, may rely on the document and the agent's instructions as if each were valid. In order for this presumption to apply, the signature of the principal must be

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genuine. Therefore, in circumstances where the validity of the principal's signature may be in question, it will be important to have policies in place to confirm the validity of such signature.

For purposes of this protection, a person or entity that conducts activities through employees and exercises commercially reasonable procedures to communicate information concerning powers of attorney among its employees will be deemed to lack actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney has followed such procedures and does not possess actual knowledge of that fact. Therefore, it will be important for institutions to establish procedures governing the collection and dissemination of information regarding their customers' powers of attorney.

Requesting Supporting Documentation. As another source of protection, a third party is able to request certain documentation before accepting an agent's authority under a power of attorney. Within seven business days of presentation of the power of attorney, a third party may request: (i) an agent's certification under oath as to any factual matter concerning the principal, agent or power of attorney; (ii) an English translation of the power of attorney; or (iii) an opinion of counsel as to any matter of law concerning the power of attorney—provided that the person making the request provides a written reason for requiring the opinion. The opinion of counsel may be requested from the attorney for the principal or agent, or from the third party's own counsel. Importantly, the cost of an English translation or opinion of counsel prepared by the principal's or agent's attorney is borne by the principal, while the cost of an opinion provided by the third party's counsel is borne by the third party.

Rules for Acceptance or Rejection of Powers of Attorney. Within seven business days of presentment of the instrument, a third party must either: (i) accept an acknowledged power of attorney; or (ii) request a certification, a translation, or an opinion of counsel. Once the certification, translation or opinion of counsel is produced, the third party has five additional

business days in which to accept the power of attorney. There are safe harbors protecting a third party who legitimately refuses to accept a power of attorney (even where a certification, translation, or opinion of counsel has otherwise been produced).

Under the safe harbor provisions, a third party is not required to accept a power of attorney if: (i) the third party would otherwise have no obligation to engage in such a transaction with the principal; (ii) the principal has otherwise relieved the third party from engaging in such a transaction with the principal's agent; (iii) engaging in the transaction with the agent or the principal would be inconsistent with federal law; (iv) the third party has a good faith belief that the power of attorney is not valid or has actual knowledge of the termination of the agent's authority; (v) delivery of a requested certification, translation, or opinion of counsel has been refused; or (vi) the third party makes, or has actual knowledge that another person has made, a report to the local adult protective services department or adult protective services hotline stating that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

If a refusal does not qualify for one of these safe harbors, a third party may be subject to a court order mandating acceptance of the power of attorney and to potential liability for costs and attorneys' fees incurred in obtaining that order. Notably, the general obligation to accept a power of attorney and the potential imposition of attorneys' fees for such a failure are significant departures from prior Virginia law.

Agent's Authority Under the Instrument. The Act requires that an express, specific grant of authority be given for an agent to perform certain acts (called "hot powers") due to the risk that those acts pose to the principal's property. These acts include: (i) creating, amending, revoking, or terminating an inter vivos trust; (ii) making a gift; (iii) creating or changing rights of survivorship; (iv) creating or changing a beneficiary designation; (v) delegating authority granted under the power of attorney; (vi) waiving the principal's right to be a beneficiary

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of a joint and survivor annuity, including a survivor benefit under a retirement plan; or (vii) exercising fiduciary powers that the principal has authority to delegate. Other, more general powers may be incorporated into the document by one of several methods including: (i) by general reference to an authority to “do all acts that a principal could do;” (ii) by reference to the specific statutory authority (*e.g.*, Va. Code §§ 26-72.04 through 26-72.16); or (iii) by inclusion of descriptive terms of such authority.

As an example, if the principal desired to grant a general authority with respect to the principal’s real property, the principal could either grant the agent the authority: (i) “to do all acts that the principal could do;” (ii) “to act for me with respect to Real Property;” or (iii) “to act as provided in Virginia Code § 26-72.04.”

Gifts by the Agent. If a power of attorney grants an agent authority to do all acts that a principal could do, the agent shall have the authority to make gifts in any amount to any individuals or to charitable organizations, or both, in accordance with the principal’s personal history of making or joining in the making of lifetime gifts. Unless the power of attorney provides otherwise, a specific grant of authority to make a gift is subject to the default limitations of Virginia Code § 26-72.17, which generally limits the gifts to the dollar limitations of the federal gift tax annual exclusion.

For more information about this topic, please contact the authors or any member of our Private Client & Fiduciary Services Team.

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