

TO OUR FRIENDS AND CLIENTS  
Memorandum



September 1, 2009

friedfrank.com

## New York's New Power of Attorney Law Effective 9/1/09: What It Means for Individuals

New York's Power of Attorney law changed September 1 in significant respects. Powers of attorney (POAs) executed prior to September 1 that are valid under existing law will continue to be valid even after the effective date of the new statute. This memorandum summarizes several of the most important changes affecting individuals who execute POAs in New York after August 2009.

### OVERVIEW

- **Scope of New Law.** The new law applies to POAs executed in New York by individuals (not entities). It also appears applicable not just to POAs used in personal financial/tax/estate planning contexts, but also to those created in business and other contexts, including POAs contained within brokerage account, partnership and other agreements. POAs executed prior to 9/1/09 remain valid; POAs executed outside New York are valid if executed in compliance with the laws of the jurisdiction of execution, regardless of whether the principal is a New York domiciliary.
- **Form Requirements.** POAs now must be printed in 12 point type (or legible handwritten equivalent); must be signed by both principal *AND* agent, whose signatures must be notarized; and must contain exact specified cautionary language (see below).
- **Gift-Giving.** Principals wishing to provide agents with gift-giving and similar powers to transfer the principal's property must execute either (i) a non-statutory POA that specifically sets forth the powers to be granted, or (ii) a statutory short-form POA simultaneous with a Statutory Major Gifts Rider ("SMGR"). The SMGR or the non-statutory form granting such powers must be witnessed by 2 witnesses (who are not potential recipients of gifts) with formalities similar to the execution of a Will.
- **Revocation.** POAs now *automatically revoke all previously executed POAs*. This often is not the desired result; until this provision of the new law changes (a goal of currently-introduced technical corrections), we suggest including language (see below) to prevent automatic revocation where not desired.
- **Fiduciary Responsibility; Compensation.** Agents now are expressly stated to be fiduciaries for principals with duties to maintain records; are accountable to the Court and to optionally-appointed monitors; receive no compensation unless specified in the POA; and always must act in the best interests of the principal.
- **When POAs are Effective.** POAs are effective upon execution by the principal and the agent (and upon any conditions stated in the POA).

A more complete explanation of the changes brought about by the new law appears on the following pages.

### **Is My Old POA Still Valid?**

Yes. POAs valid under the old law remain valid and in effect under the new law.

### **What Changes Have Been Made to the Form?**

The new law provides for a revised statutory short form POA while continuing to allow individuals to create their own non-statutory POAs using language and provisions of their choosing. For all new POAs (statutory and non-statutory) executed by individuals in New York, however, the new law imposes these requirements:

1. *Print size.* The POA must be legibly printed in type at least 12 point in size (or equivalent if in writing);
2. *Notarization.* The POA must be signed and acknowledged before a notary by both the principal AND the agent (though not necessarily at the same time); and
3. *Cautionary Language.* The POA must contain certain cautionary language (without modification) that describes the nature of the powers being created and the agent's duties to the principal (and potential liability for violating those duties). This language is available [here](#).

### **What Provisions Apply to Gift-Giving Powers?**

Principals who wish to use the statutory short form and to give agents the power to make gifts or similar transfers of the principal's property must simultaneously execute a separate rider to the statutory form called "Statutory Major Gifts Rider" (SMGR). The SMGR must be executed with the formalities similar to the execution of a Will (including being witnessed by 2 persons who are not potential recipients of gifts under the power). (Non-statutory POAs also may grant gifting powers provided the POA is executed with the same formalities required of a SMGR).

A SMGR (or non-statutory POA containing gifting powers) may grant the agent the power to: make gifts (either in limited or unlimited amounts and to a specified class such as family members or to any persons); open, modify or close accounts; procure or change life insurance on the principal; change beneficiaries of the principal's retirement plans; or create, amend, revoke or terminate a lifetime trust of the principal.

**In order to ensure gift giving powers under the new law are effective and appropriate to your specific situation, we suggest you consult with an attorney.**

### **Does Executing a POA Revoke Prior POAs?**

Significantly, the new law switches the older presumption that a newly executed POA did not revoke previously executed POAs unless specifically provided for. Under the new law, each newly executed POA revokes all previously executed POAs except as the new POA provides (and no such provisions are included in the default statutory form). Technical corrections have been introduced to undo this change, but until these are passed or subsequent legislation changes this treatment, we suggest that the following provision be added to all POAs executed by individuals in New York, unless the principal intends to revoke all prior POAs (and we suggest the second sentence should be added in all cases so that the newly created POA is not revoked inadvertently by subsequently executed POAs):

"Except as otherwise specifically provided herein, the power of attorney granted herein shall not in any manner revoke in whole or in part any power of attorney that I previously have executed. This power of attorney shall not be revoked by any subsequent power of attorney I may execute, unless such subsequent power specifically refers to this power of attorney or specifically states that the instrument is intended to revoke all prior general powers of attorney or all prior powers of attorney."

### **May a Third Party Refuse to Accept a Statutory Short Form POA?**

Historically, banks and financial institutions often refused to accept (or at least resisted accepting) any POA other than those executed on their own forms. While the old law attempted to address this, the new law expands on this subject. It provides that no third party (bank, financial institution or otherwise) may refuse to accept a validly executed statutory short form POA on grounds that it is not executed on any particular form or for any reason other than "reasonable cause." Reasonable cause is defined to include: concerns about the principal's death or the validity of the power (due to fraud, undue influence or incapacity of the principal at execution, or its possible termination); a good faith referral to adult protective services; or refusal to provide an original or attorney-certified copy of the POA. (With respect to this last point, we strongly suggest that POAs be executed in multiple original counterparts and that you give one to your attorney.) A new special proceeding may be instituted under Section 5-1510 of Title 15, Article 5 of the General Obligations Law to compel third party acceptance of any refused POA. Non-statutory POAs are still valid but do not enjoy the protections afforded statutory short forms.

### **What Other Changes Have Been Made?**

The new law contains a number of other miscellaneous provisions. These include: (i) codification that the agent holds the status of a fiduciary to the principal and must act at all times only in the principal's best interests; (ii) the optional appointment of a "monitor" with oversight capacity of the agent (particularly helpful when the principal becomes incapacitated); (iii) requirements that the agent maintain records of his or her transactions for possible later accounting; (iv) a default rule that agents receive no compensation unless otherwise specified; and (v) amplified provisions regarding the manner of termination of the POA.

\* \* \*

If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or the attorney listed below:

**Authors and Contributors:**

**New York**

[Ann B. Lesk](mailto:ann.lesk@friedfrank.com)  
[Brad J. Richter](mailto:brad.richter@friedfrank.com)

+1.212.859.8113  
+1.212.859.8630

[ann.lesk@friedfrank.com](mailto:ann.lesk@friedfrank.com)  
[brad.richter@friedfrank.com](mailto:brad.richter@friedfrank.com)

**Fried, Frank, Harris, Shriver & Jacobson LLP**

**New York**  
One New York Plaza  
New York, NY 10004  
Tel: +1.212.859.8000  
Fax: +1.212.859.4000

**Washington, DC**  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004  
Tel: +1.202.639.7000  
Fax: +1.202.639.7003

**Frankfurt**  
Taubusanlage 18  
60325 Frankfurt am Main  
Tel: +49.69.870.030.00  
Fax: +49.69.870.030.555

**Hong Kong**  
In association with  
Huen Wong & Co.  
9th Floor, Gloucester Tower  
The Landmark  
15 Queen's Road Central  
Hong Kong  
Tel: +852.3760.3600  
Fax: +852.3760.3611

**Shanghai**  
40th Floor, Park Place  
1601 Nanjing Road West  
Shanghai 200040  
Tel: +86.21.6122.5500  
Fax: +86.21.6122.5588

**Fried, Frank, Harris, Shriver & Jacobson (London) LLP**

**London**  
99 City Road  
London EC1Y 1AX  
Tel: +44.20.7972.9600  
Fax: +44.20.7972.9602

**Fried, Frank, Harris, Shriver & Jacobson (Europe)**

**Paris**  
65-67, avenue des Champs Elysées  
75008 Paris  
Tel: +33.140.62.22.00  
Fax: +33.140.62.22.29