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To: All Clients and Friends
From: Cliff Bernstein

NEW YORK BULLETIN

Revised NY Power of Attorney, Statutory Short Form & Major Gifts Rider

Effective September 1, 2009, the sections of the General Obligations Law dealing with powers of attorney were extensively amended, creating, among another changes, a new "Statutory Short Form Power of Attorney" (SSFPOA). This memo is intended to briefly summarize the changes in the law and the new form, and provide underwriting guidelines for insuring titles when a power of attorney is used at the closing. There will be times when these guidelines do not cover your particular situation or where the new law is unclear. In those situations you are expected to call counsel for guidance.

The New Form

Go to http://www.cbtitlegroup.com/files/articles/poa_NY_short_form.doc for the new Statutory Short Form Power of Attorney. To be a Statutory Short Form Power of Attorney, the exact wording of the form in the statute must be used. The attached form complies. In addition, we have added to our form of the SSFPOA the affidavit of the agent that the power is in full force and effect. If the POA form you are provided does not have the affidavit of the agent attached, it still complies with the statute. (See the discussion regarding the required affidavit from the agent at the end of this bulletin.)

If major gifts may be made by the agent, and for our purposes any transfer of real property or an interest in real property is to be deemed a major gift, then a Statutory Major Gifts Rider (SMGR) must be attached to the SSFPOA. To be valid, the SMGR must contain the exact language as provided in the statute. Go to http://www.cbtitlegroup.com/files/articles/poa_NY_major_gifts_rider.doc for a SMGR which complies with the statute.

The significant changes to the law are:

1. The parties are now called "principal" and "agent". These are now defined terms and it is important that they be used. Note that there may be only one principal in the power of attorney.
2. Any power of attorney, whether it is a SSFPOA or a non-statutory form, must be signed and dated by the principal and the agent(s). The signatures of the principal and agent must both be acknowledged in the same manner as a deed for recording.
3. A power of attorney is effective only when both the principal and agent have signed and their signatures are acknowledged. If more than one agent is appointed and they are to act jointly, the power is effective only when the principal and all the agents have signed and all the signatures are acknowledged.

4. All powers of attorney, whether it is the SSFPOA or a non-statutory form, must contain the "Caution to the Principal" (see section (a) of the SSFPOA for the exact language) and "Important Information for the Agent" (as set forth in all of section (n) of the SSFPOA)
5. A power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. For our underwriting purposes however, if there is any indication in the power of attorney that it is not intended to be durable, we should treat it as non-durable. There are no longer separate durable and non-durable forms. If a SSFPOA is to be non-durable, the principal must provide language to that effect in the "Modifications" section of the SSFPOA. You must review a non-statutory power of attorney to determine if the principal made it non-durable.
6. The execution of a power of attorney automatically revokes all prior powers of attorney, unless it states otherwise. In the SSFPOA, such revocation should appear in the "Modifications" section of the SSFPOA. If prior powers of attorney are not revoked, then you must ascertain from the "Modifications" section in the SSFPOA, or within the non-statutory form power, if the agents may act separately or must act jointly. If no statement is made in the "Modifications" section or in the non-statutory, we require the current agent(s) and the agent(s) in the prior power of attorney to act jointly.
7. The SSFPOA cannot be used to make gifts of property valued in excess of \$500 without section (h) of the SSFPOA initialed and there is a Statutory Major Gifts Rider (SMGR), which must be executed simultaneously with, and as part of, the SSFPOA.
8. Springing powers of attorney, that is powers of attorney effective at a future date or upon the occurrence of a future event, may still be created. The statute is unclear as to how or where this is designated in a SSFPOA, so the entire SSFPOA must be reviewed to ascertain if the SSFPOA is currently effective.

Changes in the use of a Power of Attorney

1. A power of attorney may be executed by an individual in his individual capacity, or in his capacity as a fiduciary or as an official of any legal, governmental or commercial entity.
 - (i) If executed in his capacity as an official of a governmental entity, you must contact counsel at CB Title for guidance.
 - (ii) If executed in his capacity as a fiduciary of an estate or a trustee of a trust, three things must be kept in mind when insuring a title based on such a power:
 - (a) In the case of a fiduciary of an estate, the powers delegated are limited to only ministerial acts.
 - (b) In the case of a trust, we must examine the trust document to determine that the trustee has been given the power to delegate his or her authority, and if so, to what extent.
 - (c) The power must designate the principal in it's fiduciary, not individual, capacity. For example, the principal must read as "A as executor under the last Will and Testament of B" or "X as trustee of the Y trust". (The new legislation does not require the specific estate or trust to be recited. If you come across a power in which the agent is acting on behalf of a principal who is a fiduciary or trustee of a trust not specifically stated in the power of attorney, you must call counsel at CB Title for guidance.)
2. A power of attorney may be executed by a corporation, partnership, LLC, or other business entity:
 - (i) A corporation, partnership, LLC or other business entity may, as principal, appoint an agent under a power of attorney. Here we must have proof that the entity has authorized the appointment of an agent to act pursuant to a power of attorney.
 - (ii) In addition an officer or other official of that entity may also delegate his or her authority to act by a power of attorney. If we are asked to insure such a

transaction, we require that the power must clearly name the principal in his capacity as an official of the entity, and must be signed in the same manner. For example, "John Jones, as President of ABC Corporation" Additionally, we must have proof that the entity has authorized the official to delegate its authority.

3. Major Gifts (For or underwriting purposes, any transfer of real property or an interest in real property is a Major Gift.)
 - (i) The Statutory Major Gifts Rider must be executed simultaneously with the SSFPOA. Note that in addition of the signature of the principal being acknowledged on the SMGR, the SMGR is also required to be witnessed by two disinterested parties (GOL 5-1514(9))
 - (ii) The gift or transaction must be specifically authorized by the SMGR.
 - (a) In addition to the SSFPOA with the SMGR, a principal may authorize the agent to make major gifts using a non-statutory power of attorney. If major gifts may be made by the agent, then the non-statutory power of attorney must not only be signed and acknowledged by both the principal and the agent(s), but the non-statutory power of attorney must also be witnessed by two disinterested individuals.
 - (iii) The agent may not create a trust for the principal, or amend, revoke or terminate an inter vivos trust created by the principal unless expressly provided for in the SMGR or in a non-statutory power of attorney.
 - (iv) The law permits the agent to transfer property of the principal to the agent. Such authority must be provided in the SMGR or in the non-statutory power of attorney. If title has passed or will pass from the principal to the agent, which transfer was or is to be made using a power of attorney, you must call counsel at CB Title to discuss that title.

Execution of Documents

The new statute now has specific guidelines as to how documents executed by an agent pursuant to a power of attorney are to be signed (GOL 5-1507). The various methods are:

1. Signing "(name of agent) as agent for (name of principal)"; or
2. Signing "(name of principal) by (name of agent), as agent"; or
3. Any similar written disclosure of the principal and agent relationship. In this scenario, we require at the very least that the agent sign his/her name.

General Underwriting Concerns

Despite language in the new statute that appears to limit our ability to refuse to accept the new SSFPOA in the course of the closing, our usual underwriting concerns remain. If you have any concerns about relying on the SSFPOA, or a non-statutory power of attorney, please call counsel at CB Title. We may refuse to insure title using the power of attorney in the exercise of our underwriting discretion.

Our underwriting guidelines continue to be:

1. We must be presented with an original or certified copy of the power of attorney.
2. We must know that the power has not been modified or revoked.
3. If we have a question as to the competency of the principal, we must know that the principal was competent when he executed the power.
4. We must be satisfied as to the identity of both the principal and the agent.

Affidavit that the power of attorney is in full force and effect

The form of affidavit satisfying our first two concerns is attached to the form of power of attorney. It must be executed by the agent(s) at the time of the closing. If the power of attorney form does not have an affidavit attached containing the exact wording of the affidavit on our form of the SSFPOA, then a separate affidavit containing the exact wording of the affidavit on our form of the SSFPOA must be executed.

Notwithstanding the execution of the affidavit by the agent that the POA is in full force and effect, if you have reason to question the capacity of the principal or have any other suspicions about the power, contact CB Title counsel for guidance.

Other forms of power of attorney

Other forms of power of attorney may still be used in New York. They fall into four broad categories:

1. A New York Statutory Short Form Power of Attorney executed prior to September 1, 2009, in accordance with the statutory form authorized at the time of its execution is still acceptable with our usual underwriting guidelines.
2. A power of attorney executed prior to September 1, 2009, that at the time of execution was not a statutory form.
 - (i) Since it was a non-statutory form at the time of execution, the powers granted must be specifically spelled out for us to accept it.
3. A power of attorney executed outside of New York that appears to be a statutory short form power of attorney of another jurisdiction that in fact complies with the laws of that jurisdiction at the time of execution. Consult CB Title counsel for guidance in this event.
4. A power of attorney executed in New York after September 1, 2009, that is not a SSFPOA:
 - (i) Must be executed in the manner of the statutory form, that is, signed and dated by both principal and agent, and acknowledged.
 - (ii) Must contain the exact language of the "Caution to the Principal" (as set forth in section (a) of the statutory short form and the exact language of "Important Information for the Agent" (as set forth in all of section (n) of the statutory short form).
 - (a) If it is to be used to make a major gift, it must also be witnessed by two disinterested individuals.

Please note that a SSFPOA effective September 1, 2009 signed by the principal prior to that date is not a SSFPOA and may not be used at a closing. On the flip side of that, a form of SSFPOA that was effective prior to September 1, 2009, and that is signed on or after September 1, 2009 may not be used at a closing.

This memorandum is not intended to be a complete dissertation of all the nuances of the new form, but a general guide to the most common issues we anticipate. There will be situations that do not correspond to the guidelines above. Please call our office with any questions.

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