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New Uniform Power of Attorney Act, Effective January 1 (Bankers' Edition)

Financial Institutions Legal Update

Washington's new Uniform Power of Attorney Act[1] (UPAA) will repeal and replace the current Power of Attorney Act, effective January 1. While an existing power of attorney document (POA) that was valid when executed will remain valid, all new POAs executed in Washington after January 1 will be valid only if they comply with the execution requirements of the new law. Below is a summary of some of the most significant provisions of the Washington UPAA from the perspective of financial institutions.

You will want to pay particular attention to the *new requirement that a financial institution may be required to accept the use of a POA in some circumstances as discussed under Section C below.*

A. Execution Requirements and Requirements Governing the Use of POAs. Under the Washington UPAA, a POA must be signed and dated by the principal, and the signature must either: (a) be acknowledged before a notary or (b) be attested to by two or more disinterested witnesses.[2] Despite the apparently parallel tracks for different methods of signing a power of attorney, note that there are safe harbors available for a party accepting an "acknowledged power of attorney"[3] that are not available for one that has merely been witnessed. For that reason, financial institutions will most likely want powers of attorney on which they rely to contain an acknowledged signature. Here are some other important rules about use of a POA:

- Under the Washington UPAA, the term "principal" in granting authority under a POA applies only to *individuals*, not to entities.
- A POA must explicitly state in the document itself that it is a "power of attorney" in order to be treated as such.
- Unless the document contains the words: "This power of attorney shall not be affected by the disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or "similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding

the principal's incapacity," the agent's authority under a POA will terminate when the principal becomes incapacitated.[4]

- A POA executed in Washington before January 1, 2017 is valid if it was valid under Washington law in effect at the time of execution; a POA executed other than under the Washington UPAA generally is valid if its execution complied with the law of the governing law stated in the POA (or where it was executed, if no specific law is given). Regardless of when a POA was executed (i.e., either before or after January 1, 2017), a POA will be treated as immediately effective, unless it states otherwise and specifies when or what will trigger its effectiveness.
- Unless the agent is also the spouse, registered domestic partner, parent or sibling of the principal, *none* of the following persons may act as an agent for the principal: any of the principal's physicians, the physician's employees or the owners, administrators or employees of the health care facility or long term care facility where the principal resides or receives care.
- A principal may designate co-agents, and such *co-agents must exercise their authority jointly*, not separately, unless the POA provides otherwise. However, aco-agent may delegate his or her authority to another co-agent.
- Except as otherwise provided by a statute other than the Washington UPAA, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

Matters of Specific Interest to Financial Institutions

- The Washington UPAA does not apply to a "power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction." In other words, a properly drafted clause that grants to a lender a power of attorney to enforce remedies like notification of account debtors or enforcement of borrower's rights against third parties does not need to be compliant with the Washington UPAA in order to be enforceable.
- Even though it is possible to grant broad powers under a POA (discussed below), there are some matters that the agent is not authorized to perform *unless* the power of attorney expressly grants the agent the authority, and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject. These include the ability to
  - Make a gift;[5]
  - Create or change rights of survivorship;

- Create or change a beneficiary designation;
- Delegate some — but not all — of the authority granted under the POA, except to a co-agent;
- Exercise fiduciary powers that the principal has authority to delegate;
- Create, amend or revoke a community property agreement; and
- Make any other provisions for non-probate transfer at death contained in nontestamentary instruments (which appears to include a pay-on-death provision on an account agreement or certificate of deposit).

• While there are some limitations, the Washington UPAA generally adopts the numerous detailed grants of general authority specified in the uniform act, which are more detailed and more comprehensive than those explicitly described undercurrent Washington law. Subject to those limitations, "if a power of attorney grants to an agent authority to do all acts that a principal could do or contains words of similar effect, the agent has the general authority described in" all of the specific sections. Of note and among other rights, unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to

- Real property — authorizes the agent to pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, extend the time of payment of a debt of the principal or a debt guaranteed by the principal, or as security for a nonmonetary obligation;
- Tangible personal property — authorizes the agent to grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;
- Stocks, bonds and financial instruments — authorizes the agent to pledge stocks, bonds and financial instruments as security to borrow, pay, renew or extend the time of payment of a debt of the principal;
- Banks and other financial institutions — except as otherwise set out in chapter 30A.22 RCW authorizes the agent to, among other things:
  - Continue, modify and terminate an account or other banking arrangement made by or on behalf of the principal or establish, modify or terminate such relationships with financial institutions selected by the agent;

- Contract for other banking services, including safe deposit boxes and open and take items from, any existing safe deposit box;
- Withdraw (by check, order, electronic funds transfer or otherwise) money or property of the principal deposited with or left in the custody of a financial institution;
- Receive information from a financial institution, including bank statements;
- Borrow money and pledge as security personal property of the principal necessary to borrow money, pay, or renew or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;
- Make, assign, draw, endorse, discount, guarantee and negotiate promissory notes, checks, drafts and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order; transfer money, receive the cash or other proceeds of those transactions; and accept a draft drawn by a person upon the principal and pay it when due; and
- Consent to an extension of the time of payment with respect to a financial transaction with a financial institution.

Note that there are also sections regarding the effect of general authority given to the agent under the POA with regard to the topics of operation of an entity or business; insurance and annuities; estates, trusts and other beneficial interests; claims and litigation; personal and family maintenance; benefits from governmental programs or civil or military service; retirement plans; taxes; gifts; health care matters; and care of the principal's minor children.

B. Termination of a POA. Under the Washington UPAA, a POA terminates upon the occurrence of the following events:

- The principal dies;
- The principal becomes incapacitated, unless the power of attorney contains the durability language discussed above;
- The principal revokes the POA;
- The POA provides for its termination upon the happening of a certain event and that event occurs;
- The purpose of the POA is accomplished; or
- The principal revokes the agent's authority or the agent dies, becomes incapacitated or resigns, and the POA does not provide for a successor agent.

The agent's authority under a POA terminates when:

- The principal revokes the agent's authority;
- The agent dies, becomes incapacitated or resigns; or
- An action is filed for dissolution or annulment of the agent's marriage or state-registered domestic partnership to the principal, or for their legal separation (unless the POA provides otherwise).

In addition, if a court appoints a guardian of the principal's estate or other fiduciary charged with management of *all* of the principal's property, then the POA is terminated, unless the court provides otherwise. Note, however, if a limited guardian or fiduciary is appointed, the POA will not be terminated or modified, except to the extent ordered by the court.

An existing POA is *not revoked or terminated* upon the execution of a new POA unless the new POA expressly revokes the prior POA. This means that it would be possible for there to be multiple POAs outstanding at any one time giving the same rights to different agents.

C. Obligations Upon Presentation of a POA. The Washington UPAA provides that if you are asked to accept an *acknowledged* POA, you *may*, within seven business days of its presentation, request an agent's certification, using a certification form that is part of the statute, and *must* accept the acknowledged POA within five business days of having received the statutory certification (or language translation, if necessary), unless you believe in good faith that the acknowledged POA (i) is not valid; (ii) that the agent is acting outside of his or her authority; or(iii)if you make or have actual knowledge that another person has made a report to the Adult Protective Services Division of the Washington State Department of Social and Health Services stating a good faith belief 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. Of course, you are not required to accept an acknowledged POA if you are not otherwise required to engage in the transaction with the principal in the same circumstances.

You may not, however, insist on a certain form of acknowledged POA, nor can you refuse to accept an acknowledged POA simply because you believe it is too old.

Wrongful refusal to accept an acknowledged POA can result in the agent obtaining a court order requiring you to accept the acknowledged POA, along with your being ordered to pay the agent's attorney's fees for having had to seek the court order.

Note: You are protected when you reasonably rely on an acknowledged POA in good faith without actual knowledge that it is void, invalid or

terminated or that it is being misused by the agent. The issue of when any organization has "actual knowledge" is usually a thorny one, but the Washington UPAA includes an additional safe-harbor provision: A person that conducts activities through employees is without 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 is without actual knowledge of the fact.

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[1] Like many "uniform" acts as they are eventually adopted by individual states, the Washington state version of the UPAA contains numerous variations from the version proposed by the Uniform Law Commission in 2006.

[2] Home care providers, care providers at an adult family home or long-term care facility in which the principal resides, and individuals related to the principal by blood or marriage are not considered disinterested witnesses.

[3] Under the Washington UPAA, "'acknowledged' means purportedly verified before a notary public or other individual authorized to take acknowledgments," i.e. notarized, not merely witnessed.

[4] Note that "incapacity" is limited to "inability of an individual to manage property, business, personal or health care affairs because the individual" (i) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (ii) has absented himself or herself and that his or her whereabouts is unknown and cannot with reasonable diligence be ascertained, or has been reported or listed as missing in action, or interned in a neutral country, or captured by the enemy during a state of hostilities exists between the U.S. and any other power and for one year thereafter; or (iii) is outside the United States and unable to return.

[5] It should be noted here that there is Washington case law saying that a guaranty may, in some circumstances, be a gift, at least for community property purposes.