AMERICAN BANKERS ASSOCIATION

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Via Electronic Mail and U.S. Mail

February 8, 2006

John P. Burton, Chair
Drafting Committee on Uniform Power of Attorney Act
Rodey Law Firm
P.O. Box 1357
Santa Fe, NM 87504-1357

Re: Draft of Uniform Power of Attorney Act for February Drafting Committee Meeting

Dear Jack:

The American Bankers Association (ABA) appreciates the opportunity to comment on the referenced draft. The ABA brings together all categories of banking institutions. Its membership -- which includes community, regional, and money center banks and bank holding companies, as well as savings associations, trust companies, and savings banks -- makes ABA the largest banking trade association in the country.

In October we submitted comments on the 2005 Annual Meeting draft. You will recall that in order to properly evaluate the practical impact of drafts on our members, ABA formed a working group of bank attorneys, state association counsel, trust officers, trust counsel, and others. The group represents a cross section of professionals. It includes those with in-depth trust experience, attorneys who provide advice to the retail side of financial institutions, and state association counsel who lobby state legislatures on behalf of their members.

The ABA working group (Group) met in January, and improvements in the latest draft were recognized. We appreciate the consideration that you and the Drafting Committee have given to our views. Nevertheless, several concerns with the referenced draft were identified during our Group meeting and are highlighted below. We have also received valuable input from bankers as a result of publicizing the drafting project in *ABA UCC/Uniform Law News*, a periodic e-mail bulletin provided to employees of ABA member institutions. I anticipate providing additional comments at the drafting meeting reflecting this diverse input.

In addition, some of our members have filed or intend to provide comments on the February meeting draft. ABA shares many of the concerns likely to be reflected in those comments.

1. **Sections 118 and 119.** Several Group members continue to have concerns with section 118(f). That section provides that with specific exceptions, a person

presented with a power of attorney may not require an additional or different form than the one provided. There are instances where precisely this course of action -- requiring more documentation -- is in the best interest of the customer.

For example, the POA presented might satisfy the Act's minimum requirements, but the statutory form or another form would more accurately reflect the extent of the agent's authority. Nevertheless, section 118(f) would not allow a financial institution to require an agent to submit the statutory form, nor could the institution require submission of any other form. For this reason and others, financial institutions should have more leeway to decline to accept a POA presented or to require execution of a different POA form, and we recommend the deletion of section 118(f).

Moreover, section 118(f) might prevent banks from protecting their customers from financial exploitation. One reason is because 119(b)(3) is drafted in the past tense (*i.e.,* the person *has* made a report). The prior filing of a report with the protective services unit should not be *the only way* (in addition to having actual knowledge that another has made a report) to obtain benefit of the provision. There might not be adequate time to file with the unit, or there might be more effective ways to prevent financial exploitation of the customer.

A related matter involves the interpretation of "invalid" in section 118(a) and the word's relationship with subsequent subsections and section 119. To be afforded the protection of section 118(a), a person accepting a POA must be without actual knowledge that it is invalid. Yet Section 119 might be interpreted as imposing liability on a financial institution for refusing to accept a POA containing a certification or an opinion of counsel attesting to the document's validity -- even though the institution is convinced that the POA is invalid. For clarity, a specific provision should be included in section 119(b) allowing refusal when the person believes in good faith that the POA is invalid, although a certification or an opinion attesting to the POA's validity might be provided [see item #2.a. below].

In addition, our October 7 comment letter outlined concerns relating to the Customer Identification Program (CIP) rules of the USA PATRIOT Act. Group members continue to raise questions regarding whether the draft provides clear protection to financial institutions when they require information or act in accordance with the CIP rules and the Anti-Money Laundering Program regulations. Set forth below in item #2.d.(5) is some clarifying wording addressing this subject.

Bottom line: Flexibility in this area is critical. The above items are only examples. It is difficult to predict with certainty every situation when another or different POA form would be in the customer's best interest.

2. **Specific Revision Language.** In order to address the above and related issues, we recommend revisions to section 119(b) noted below. We are continuing to evaluate comments from our members and might suggest additional modifications to the wording at the February drafting meeting.

a. In (b)(2), strike "reasonably believes" and substitute "believes in good faith"; after the word "requested", insert the following: ", even though an agent's certification, a translation, or opinion of counsel might be provided".

b. In (b)(3), after the word "made" (the first time it appears), insert "or intends to make"; strike "alleging" and substitute "suggesting".

c. In (b)(4), increase the five business days period to a more appropriate number. Similarly, there should be an appropriate business day period after receipt of an agent's certification, a translation, or an opinion of counsel to evaluate the document and during which its acceptance is reasonable.

d. Add the following new paragraphs to (b):

(5) the person's actions are allowed under federal or state law or regulations;

(6) the person does not offer a service sought under the power of attorney; or

(7) the person's actions are reasonable under the circumstances.

3. **Actual Knowledge.** For clarification, we recommend that the following be included as a new section in the Act:

Section ___. A person that conducts activities through employees shall not be charged under this Act with actual knowledge of any fact relating to a power of attorney, nor of a change in the authority of an agent, unless the information is actually received by an employee conducting a transaction involving the power of attorney at issue, and the employee has a reasonable time in which to act on the information.

4. **Time Period for Requesting an Agent's Certification, a Translation, or an Opinion of Counsel.** We recommend that the three business day time period in section 118(e) for requesting the above items be increased to a more appropriate number. In addition, there should be an expense-shifting provision so that a person failing to request the document within the period does not lose its right to do so but will have to bear the expense of obtaining the document.

5. **Liability Provisions.** A number of bankers question the justification for the section 119(a)(2) liability provisions, inasmuch as research shows that a very small number of states impose such sanctions. We recommend that paragraph (2) be deleted. In addition, we urge the deletion of sections 120 and 121. Section 121 opens the door to multiple additional claims. It provides that the remedies under the Act are not exclusive and do not abrogate any right or remedy under the law of this state. Section 120 incorporates numerous and unknown principles of law and equity to "supplement" the Act's provisions.

6. **Portability Provisions.** Several members have serious objections to certain provisions in Section 106. For example, some felt that section 106(a)(2) should be deleted. Others suggested that it would be helpful to add at the end of (a)(2)

wording such as the following: "if the same is specified in the document." The latter believed that such wording would avoid unnecessary speculation on what the principal's intent was with respect to governing law. We note that the recently released Style Committee draft has revised the section, and on February 6, 2006, the Reporter released recommendations for revisions, including ones to Section 106. We will try our best to obtain our Group's comments on these latest changes prior to the drafting meeting; however, we may need to provide those comments after the meeting.

We continue to have concerns with section 107, particularly the provisions relating to the public policy of a state. Determining the public policy of a given state is frequently difficult, and we urge the Drafting Committee to carefully evaluate the reasonableness and practicality of this section.

7. **Co-agents.** A Group attorney with diverse experience in representing financial institutions provided the following comments:

"Section 111(a)(2) – As noted later, the statutory form does not easily enable one to name co-agents. In our experience they are frequently named, not with the intent that they act jointly, but because the principal wants to name all her children. Thus, we would prefer that the presumption be reversed and if co-agents were named each could act individually unless otherwise specified. Section 111(a)(2) continues to be problematic and many of the problems would be eliminated if the presumption in Section 111 were reversed. If it is not, it seems likely that if co-agents must act and they are attempting to act with less than a majority of them, a certification will be required.

Section 301 is set up so that a single agent can be named, in series. It has been our experience, however, that customers will invariably write a couple names in. Thus, the presumption of how this should be handled should be stated in the short form with a preference for any one individual agent being able to act separately."

Several Group members agree with the above, and we encourage the Drafting Committee to consider the above recommendations.

8. **Effect on Existing Powers of Attorney.** Group members continue to raise questions regarding section 404, which contains significant provisions relating to the effect on existing powers of attorney. Among other things, several question whether it is good policy to make a nondurable power of attorney (created before this Act) a durable one, as section 404(1) attempts to do (see also section 104). One must question whether this result would be consistent with the principal's apparent wishes.

9. **Preemption and Visitorial Powers.** Both the Comptroller of the Currency and the Office of Thrift Supervision have promulgated regulations governing those instances where state law may or may not be preempted (*See generally*, 12 CFR Sections 7.4007, 7.4008, 7.4009, 34.3, 34.4, and 7.4000; 12 CFR Part 560).

The draft raises issues relating to preemption and visitorial powers, and we will have additional comments on this subject at the drafting committee meeting.

Again, thank you for the opportunity to comment. We appreciate your consideration of our views. The ABA is continuing to evaluate the many issues raised, and we look forward to attending the February meeting of the Drafting Committee.

Sincerely,

L.H. Wilson
Associate General Counsel