AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

World-Class Solutions, Leadership & Advocacy Since 1875

L.H. Wilson
Associate General Counsel
202-663-5030
lwilson@aba.com

Via Electronic Mail and U.S. Mail

June 28, 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: 2006 Annual Meeting Draft of Uniform Power of Attorney Act

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.

ABA has represented the industry at several Drafting Committee meetings and has submitted comment letters on drafts of the Act. 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) meetings have provided a forum for the exchange of views and have been beneficial in determining recommendations of an industry whose members are frequently asked to accept a power of attorney. 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.

Changes Needed. We recognize improvements in this latest draft and appreciate the consideration that you and the Drafting Committee have given to our views. Nevertheless, changes are necessary to encourage acceptance by our industry. Without revisions, we are convinced that the Act will be actively opposed by several state bankers associations and financial institutions. This is especially the case given that ABA continues to receive reports that existing POA statutory provisions in several states are working well and that there is no compelling need to change their laws in favor of this wide-ranging act. A narrowly-tailored act (1) with a statutory

POA form, (2) that affords protection to persons relying on a POA, and (3) not having the objectionable provisions highlighted below would have a much better chance of enactment in state legislatures.

1. Objections to Section 120. Our members have raised several objections to Section 120 (see below), and we strongly urge that the section be deleted. If the Drafting Committee is unwilling to take this approach, we recommend that the wording of Section 120 be revised to make clear that either (1) the section contains default rules only and that its terms may be modified by agreement or (2) the section applies only when the statutory form is presented.

A. Mandatory Acceptance Provisions Can Create Practical Problems. We are particularly concerned with the provisions relating to mandatory acceptance of a POA and the prohibition on requiring an additional or different form than the one provided [see Section 120(a)]. 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 120(a) 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. Flexibility in this area is critical. Otherwise, the section will in some cases prevent financial institutions from protecting their customers from financial exploitation.

We continue to urge consideration of the recommendation of a Commissioner offered during the 2005 NCCUSL Annual Meeting:

"I will just recommend that you would give some thought to preserving the ability of a principal to contract with custodians of property to require more specific assurances in dealing with agents, both to prevent fraud and to assure that agents are indeed acting within the proper scope of their authority."

Provisions mandating acceptance of a POA will be a radical change for financial institutions in many states. Indeed, our research indicates that even in the small number of states having such provisions, the mandates are frequently limited to requiring acceptance of a *statutory* form only [e.g., New York Gen. Oblig. Law Sec. 5-1504; Alaska Stat. Sec. 13.26.353(c)] -- rather than being aimed at securing acceptance of most any acknowledged POA presented (as the draft does).

In addition, we have found no state law that has the broad restriction in Section 120(a)(3) that prohibits requiring an additional or different form of POA than the one presented. We again ask: Are there any states that have such a broad restriction, and if so, do you have a citation to the statutes? Rather than prohibiting a financial institution from requiring an additional or different form, the wording should be clear that such is permitted.

As justification for imposing mandatory acceptance provisions, proponents cite an October 29, 2002, report entitled *National Durable Power of Attorney Survey Results and Analysis*. Unfortunately, participation in the survey was both limited and not representative, inasmuch as those frequently asked to accept a POA -- financial institutions, insurance companies, and securities firms -- were not surveyed. Moreover, attorneys surveyed were simply asked: Ever experience difficulty obtaining third party acceptance of an agent's authority? Although 20% of respondents replied "No," 63% indicated "Yes occasionally," and only 17% said "Yes frequently," proponents reached the questionable conclusion that mandatory acceptance provisions are needed in the Act. Respondents were not asked the reason for rejection or if the matter was resolved in a satisfactory manner. Apparently, it was assumed that the rejection had no merit.

B. Five-Business-Day Time Period is Problematic. The five-business-day requirement for acting on a POA in Section 120(a)(1) and (2) is inadequate. As one Group member noted, the less time that institutions are given to respond and review a POA, the greater the likelihood that an improperly procured or invalid POA is accepted to the detriment of the principal. With an aging population and increased life spans, there is an equally valid public policy reason for wanting to protect the public from unscrupulous individuals who might improperly induce a person to execute a POA in their favor.

The five-business-day limit can also present operational problems for institutions. For example, a POA might be presented at a branch in one state but actually need to be handled by a branch in another, and it might take longer than five business days to be received at the proper branch. Section 119(e) might be read to offer some relief, but use of different terminology in the applicable sections [e.g., "actual knowledge" in Section 119(e), "presentation" in Section 120(a)(1), and "receipt" in Section 120(a)(2)] raises questions and can result in unintended consequences.

In addition, Section 120(a)(2) has drafting flaws because it assumes, for example, that the opinion of counsel received addresses all issues requested in a satisfactory manner. What if the opinion does not, or what if the opinion questions certain provisions? Read literally, Section 120(a)(2) requires acceptance of the POA no later than five business days after receipt of the certification, translation, or opinion of counsel.

C. Sanctions Should Not be Included. We continue to question the justification for Section 120(b) liability provisions, inasmuch as research shows that a very small number of states impose such sanctions. The provisions can result in a windfall and would encourage litigation. One Group member expressed concerns about what "costs incurred" might include in his state. We suspect this will be a potential problem in other states as well. Subsection (b) will be an obstacle to enactment, and we recommend that it be deleted.

D. Additional Clarifying Provisions are Needed in Section 120(c). Subsection (c) specifies situations when an acknowledged POA is not required to be accepted. We recommend that the following additional provisions be included in the

subsection. Note that several of these are taken or derived from the recently-enacted North Carolina POA statute.

Add the following new paragraphs to subsection (c):

(6) the agent has previously breached any agreement with the person, whether in an individual or fiduciary capacity;

(7) the principal is not currently a customer of the person and the agent is seeking to open an account for such principal;

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

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

(10) the person's actions are reasonable under the circumstances, whether or not an agent's certification, a translation, or an opinion of counsel has been requested or provided.

Paragraph (8) is particularly important because of Customer Identification Program (CIP) rules (see 31 C.F.R. Sec. 103.121 *et seq.*) of the USA PATRIOT Act. Among other things, these rules require that banks must have risk-based procedures for verifying the identity of each customer to the extent reasonable and practical. Our previous comment letters have outlined the broad requirements in more detail and the concern of ABA members. The Act's provisions and Comments should provide clear protection to financial institutions when they require information or act in accordance with the CIP rules and the Anti-Money Laundering Program regulations. While Section 122 is helpful, paragraph (8) is necessary to clarify the matter.

2. Section 123 Should be Deleted. Section 123 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. We reiterate our strong objection to this section and urge that it be deleted.

3. Section 121 Should be Deleted. This section incorporates numerous and unknown principles of law and equity to "supplement [the Act's] provisions" unless "displaced" by a provision in the Act. There will be continual litigation regarding whether a principle of law or equity is "displaced" by a provision of the Act. No compelling need was cited for this section, and we again urge its deletion.

4. Concerns with Section 119. Subsection (a) addresses reliance in connection with a record *purporting* to be an acknowledged POA, but subsections (b) and (c) do not. Similar language allowing reliance on a record *purporting* to be an acknowledged POA should be included in the latter subsections. Otherwise, there will be questions about whether a person is entitled to rely, for example, on a record *purporting* to be an acknowledged POA that has a principal's valid signature but -- unknown to the person accepting the POA -- contains a forged acknowledgement.

Item 1.B. outlines our objections to provisions relating to five business days. This period is inadequate, and we note our concerns with the five-business-day period in Section 119(d).

5. Acceptance of Photocopies or Electronic Copies Can Have Unintended Consequences. Section 106(d) specifies that "[e]xcept as otherwise provided by law other than this [act], a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original." When combined with provisions relating to mandatory acceptance of a POA (see Section 120), giving paper or electronic copies of a POA the same force as the original instrument can prevent a financial institution from protecting their customers from fraud. As drafted, the section apparently overrides a principal's contract with a financial institution to honor only powers of attorney in a certain form or meeting a certain standard. How will a financial institution know if the POA presented is a photocopy or electronically transmitted copy of an "original power of attorney"? Is this section consistent with the Uniform Electronic Transactions Act and ESIGN (the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Sec. 7001 *et seq.*)?

6. Definition of "Incapacity" is Broad and Ambiguous. One Group member noted the drawbacks of the Section 102(5) definition of "incapacity" -- overly broad and ambiguous. Among other things, "incapacity" means inability of an individual to manage property or business affairs because the individual is (i) missing, (ii) detained, or (iii) outside the United States and unable to return. Similar wording is used in Section 109. Narrowing and clarifying the definition are needed.

7. Relevance Test Needed in Section 116. Section 116 allows a wide range of persons to petition a court for judicial review to construe a POA or to review an agent's conduct. These persons are generally not required to demonstrate any relevant interest in the particular matter questioned. Appropriate relevance standards should be included.

8. Effect on Existing Powers of Attorney. Group members continue to raise questions regarding Section 403, which contains significant provisions relating to the effect on existing powers of attorney. We urge a careful review of the potential impact of these provisions.

9. Technical Changes. We also recommend the changes below.

A. Section 108(b). A Group member noted that the intent of Section 108(b) is not clear without the second sentence (which is bracketed) and suggested that the brackets be removed.

B. Section 114(g). For clarification, a Group member suggested that the words "provided in the power of attorney" be inserted between the words "authority" (the first time it appears) and "to". As revised the initial words of Section 114(g) would read as follows: "An agent that exercises authority provided in the power of attorney to delegate to another person the authority granted . . . ."

C. Section 211. For clarification, a Group member suggested that the words "as a beneficiary" be inserted between the words "entitled" and "to" in the opening paragraph of Section 211. As revised, the third line on page 43 would read as follows: "or custodianship or a fund from which the principal is, may become, or claims to be, entitled as a beneficiary to a . . . ."

D. Section 217(a). A Group member noted that some states have not adopted the Uniform Transfers to Minors Act but use the Uniform Gifts to Minors Act. Accordingly, it would be good to also reference the latter Act in Section 217(a).

Thank you for the opportunity to comment. Although we have previously raised many of these issues, ABA continues to be concerned about them and appreciates your consideration. We look forward to attending the 2006 NCCUSL Annual Meeting.

Sincerely,

L.H. Wilson
Associate General Counsel