

(1/12/06)

## **ABA UNIFORM POWER OF ATTORNEY ACT WORKING GROUP**

### **Issues Paper Re: Draft for February NCCUSL UPOA Act Drafting Committee Meeting**

1. Draft for February UPOA Act Drafting Committee meeting is available on NCCUSL's website: [www.nccusl.org](http://www.nccusl.org) (see <http://www.law.upenn.edu/bll/ulc/dpoaa/2006FebMtgDraftrev.htm>).
2. ABA's 10/7/05 comment letter (available at <http://www.aba.com/aba/documents/legal/LtrUPOAAct10.7.05.pdf>) outlines concerns and enactability issues with an earlier draft.
3. Protection of person dealing with agent. Section 118 is a key section and is reprinted below:

#### **SECTION 118. PROTECTION OF PERSON DEALING WITH AGENT.**

(a) A person that in good faith accepts an agent's authority without actual knowledge that the agent's authority has been terminated, the power of attorney has been terminated or is invalid, or the agent is exceeding or improperly exercising the agent's powers, is protected from liability as if the power of attorney were still in effect and valid and the agent had properly exercised the power.

(b) A person may request and, without further investigation, rely upon an agent's certification under penalty of perjury of any matter concerning the principal or the power of attorney.

(c) A person presented with a power of attorney that contains, in whole or in part, language other than English may request that the agent obtain, at the principal's expense, an English translation of the power of attorney, and may, without further investigation, rely upon the translation.

(d) A person presented with a power of attorney other than a power of attorney executed on a statutory form under the Uniform Power of Attorney Act may request that the agent obtain, at the principal's expense, an opinion of counsel as to any matter concerning the principal or the power of attorney, and may, without further investigation, rely upon the opinion of counsel.

(e) A request under this section for an agent's certification, a translation, or an opinion of counsel must be made not later than three business days after presentation of a power of attorney.

(f) Except when an agent's authority is refused under Section 119(b), a person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(g) Except as otherwise required by a law of this state, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

• **Does Section 118 provide adequate protection to an institution handling a POA?**

**Section 118(a) has an "actual knowledge" standard. Note that Section 118(c) applies when a POA contains language other than English. Note that Section 118(d) applies when a person is presented with a POA other than one executed on a statutory form. Note the three-business-day time limit in Section 118(e) for requesting an agent's certification, a translation, or an opinion of counsel. Section 118(f) has an exception to the general rule that a person may not require an additional or different form of POA than the one presented.**

• **What, if any, changes to the wording of Section 118 do you recommend?**

• **Is the exception in Section 118(f) adequate? ABA argued against provisions that afford a financial institution little leeway to decline to accept a POA presented or to require execution of a different form.**

4. Liability for refusal to accept agent's authority. Section 119 is another critical section and is reprinted below:

**SECTION 119. LIABILITY FOR REFUSAL TO ACCEPT AGENT'S AUTHORITY.**

(a) A person that unreasonably refuses to accept a power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney;

and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding necessary to confirm the validity of a power of attorney or to mandate acceptance of the power of attorney.

(b) A person's refusal to accept a power of attorney is not unreasonable if:

(1) the person has actual knowledge of the termination of the agent's authority or termination of the power of attorney before exercise of the power;

(2) the person reasonably believes that the power is not valid or that the agent does not have the authority to perform the act requested;

(3) the person has made a report in good faith to the [local adult protective services unit] alleging physical or financial abuse, neglect, exploitation, or abandonment of the principal by the agent or has actual knowledge that such a report has been made by another person; or

(4) the power of attorney is subsequently accepted within the later of five business days after presentation of the power of attorney or the date of receipt of an agent's certification, a translation, or an opinion of counsel if requested under Section 118.

(c) A person is not required to accept the agent's authority or to conduct business with the agent if the person is not otherwise required to conduct business with the principal in the same circumstances.

- **Are the revised liability provisions in Section 119 acceptable? Do these provisions when read with Sections 120 and 121 (see below) raise any concerns?**

**Sections 120 and 121 are reprinted below:**

SECTION 120. PRINCIPLES OF LAW AND EQUITY. Unless displaced by a provision of this [act], the principles of law and equity, including the law governing capacity to contract, principal and agent, entity operation and interests, estoppel, fraud, misrepresentation, duress, coercion, mistake, ratification, bankruptcy and other validating or invalidating cause, supplement this [act].

SECTION 121. REMEDIES UNDER OTHER LAW. The remedies under this [act] are not exclusive and do not abrogate any other cause of action or remedy under the law of this state.

- **Section 119(b) specifies four situations when a person's refusal to accept a POA is not unreasonable. Are these adequate or should any revisions be made to the provisions?**

- **Does the wording of Section 119(c) present any problems for your institution?**

5. Definitions. Section 102 contains definitions of various terms.

- **What, if any, changes should be made to this section?**

- **Section 102(3) defines "good faith" as honesty in fact. Is this definition acceptable? "Good faith" is used in several places in the draft [e.g., Sections 110(d), 110(e), 113(c), 118(a), 119(b)(3), and 301].**

- **Should other terms be defined?**

6. Scope. Section 103 provides that the Act applies to all powers of attorney with certain exceptions.

- **Is the scope too broad? too narrow?**

- **Is the wording of the exceptions satisfactory?**

7. Knowledge; notice. Note that a section in a prior draft relating to knowledge and notice is **NOT** included in this draft. That deleted section is reprinted below:

SECTION 104. KNOWLEDGE; NOTICE.

(a) Subject to subsection (b), a person has knowledge of a fact involving a power of attorney if the person:

- (1) has actual knowledge of it;
- (2) has received a notice or notification of it; or

(3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization has notice or knowledge of a fact involving a power of attorney from the time it is brought to the attention of the individual conducting a transaction involving the power of attorney and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction and the organization reasonably complies with the routines. Reasonable diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information. If an organization conducts activities through branch or multiple offices, notice to a branch or office other than the office where the power of attorney is presented is attributable to the individual conducting the transaction not later than three business days after the date of notice to the branch or other office.

• **Do you agree with this change or should another approach be considered?**

• **Note that the term "actual knowledge" is used in several places [e.g., Sections 110(d), 110(e), 111(c), 118(a), 119(b)(1), and 119(b)(3)]. Should this be a defined term? If so, how should it be defined?**

• **Would it be advisable to include wording such as the following in the Act? 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.**

8. Portability. Sections 106 and 107 are described as follows in the draft's Prefatory Note: "Section 106 is a portability provision for powers of attorney not executed under the Act and Section 107 states the guidelines for interpretation of such powers."

• **Please carefully review the statutory wording of Sections 106 and 107 (reprinted below).**

#### SECTION 106. VALIDITY OF POWER OF ATTORNEY.

(a) A power of attorney executed in another state or country is valid and enforceable in this state if, when it was executed, the execution complied with:

(1) the law of the state or country in which the power of attorney was executed; or

(2) the law of the state or country that the principal intended govern the power of attorney.

(b) A power of attorney executed in this state before the effective date of this [act] is valid and enforceable if its execution complied with the law of this state as it existed at that time.

(c) A power of attorney executed in this state is valid and enforceable if its execution complies with section 105.

SECTION 107. INTERPRETATION OF POWER OF ATTORNEY. A power of attorney shall be interpreted under the law of the state or country that at the time of execution the principal intended govern the power of attorney. If the law of that state or country conflicts with this [act], the law of that state or country controls unless prohibited or restricted by the public policy of this state. This [act] may not be applied to enlarge the scope of authority granted to an agent in a power of attorney.

• **Do the above provisions present any practical problems for your institution?**

• **What, if any, changes should be made?**

• **Do you have any concerns with the "public policy" provision in Section 107 or other terminology in this section?**

9. Optional form. Article 3 contains an optional form that "may be used to create a power of attorney that has the meaning and effect prescribed by this [act]." It appears that use of the form does not operate as a true safe harbor (i.e., one cannot require an agent to submit the statutory form since its use is optional).

• **Should use of the form operate as a true safe harbor?**

• **Is there a better approach?**

10. Effect on existing powers of attorney. Article 4 contains significant provisions relating to the effect on existing powers of attorney. During our July conference call, several of you expressed concerns with their impact in some cases.

• **Have your views with respect to Article 4 changed since our July conference call?**

11. Preemption and Visitorial Powers. The OCC has issued final preemption and visitorial powers rules (see 12 CFR Secs. 7.4007, 7.4008, 7.4009, 34.3, 34.4, and 7.4000). The preemption rule clarifies the extent to which the operations of national banks are subject to state laws. It identifies the types of state laws that are preempted under the National Bank Act, as well as those which generally are not. The OCC notes that the laws listed as preempted in its regulation are virtually identical to those listed as preempted with respect to federal thrifts in existing regulations of the Office of Thrift Supervision. (see 12 CFR Secs. 560 *et seq.*)

• **Does the draft raise any issues relating to preemption or visitorial powers?**

12. Other provisions. The above highlights a limited number of issues. If you have concerns relating to other provisions of the February NCCUSL draft, please bring them to the attention of L.H. Wilson at [lwilson@aba.com](mailto:lwilson@aba.com) or (202) 663-5030.