MBA LEGAL COMPLIANCE BULLETIN

In This Bulletin

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I. REFUSING TO ACCEPT POWERS OF ATTORNEY

From time to time, concerns are raised by Minnesota attorneys about banks refusing to accept their clients' powers of attorney. Recently a group of attorneys has complained to legislators, the Attorney General's Office, and the Department of Commerce about banks requiring the use of the bank's own power of attorney form or refusing to honor powers of attorney that the bank feels are too old or "stale." These attorneys have asked these groups to consider tougher penalties against those that refuse to accept a valid power of attorney. The MBA offers the below information about powers of attorney to help its members make informed decisions about the acceptance of these documents. We encourage banks to consult their legal counsel before refusing to accept a power of attorney.

Power of Attorney Basics

Minnesota has an entire chapter of statutes concerning powers of attorney. The statutes are available online at http://www.revisor.leg.state.mn.us/stats/523/ and are a good place to find answers to most power of attorney questions. While the statutes address most aspects of the power of attorney arrangement, questions occasionally arise that are not answered in the statutes. There is very little Minnesota case law on powers of attorney to help answer those questions. Chapter 2 of the MBA Deposit Accounts Procedures Manual is an additional resource for power of attorney information.

Creation of Power of Attorney

A person, called a principal, may grant authority to another, called an attorney-in-fact, to act on the principal's behalf. This grant of power is called a power of attorney. Although it is called a power of attorney, an actual attorney does not need to be involved in any way. The principal may grant a power of attorney that gives only a limited amount of authority to the attorney-in-fact, or the power-of-attorney may be extremely broad in scope and authorize "all transactions." Unless the principal is incapacitated, he may continue to execute documents on his own behalf, even though his has given power of attorney to another.

Statutory Short Form

The statutes provide a standard power of attorney form in Minn. Stat. § 523.23, which is available online at http://www.revisor.leg.state.mn.us/stats/523/23.html. The bank should carefully review the form to determine what powers it conveys. Most commonly, the "banking transactions" or the "all powers" lines will be checked, giving the attorney-in-fact the power to act for the principal in most

banking transactions. Subdivision 4 of this statute describes with specificity the actions an attorney-in-fact is authorized to take when the banking transactions option is elected.

The form does not have to be notarized to be effective. However, the bank should insist on seeing either the original or a certified copy of the original. The bank will then take a copy of the form for its records and return the original to the attorney-in-fact.

If the attorney-in-fact provides a form that is not the statutory short form, the bank should review the provisions of the power of attorney to determine if the proposed action is authorized. If the power of attorney form was executed in another state and on a form that was valid in that state, banks must accept the form. Banks may want to consult their counsel when presented with a power of attorney from another state.

Power of Attorney Assumed to be Valid

A written power of attorney that is dated and purports to be signed by the principal is presumed to be valid. Minn. Stat. § 523.04. This means that a third party, like a bank, can assume that a power of attorney is valid. However, if the third party has actual knowledge that the power of attorney is not valid, it cannot rely on the statute.

Duration of Power

A power of attorney normally exists until the principal dies, revokes the power, or the power of attorney terminates due to an expiration date on the form. Some powers of attorney will terminate when a principal becomes incapacitated. A power of attorney that continues to be effective after the principal becomes incapacitated is called a durable power of attorney.

A bank can determine whether a power of attorney is durable by reviewing the statutory short form to see which box is checked by the principal. If the box is checked stating that the power of attorney continues to be effective if the principal becomes incapacitated or incompetent, then it is considered a "durable" power of attorney. A durable power of attorney is valid until the first to occur of the following: the principal dies, the power is revoked by the principal, the power expires due to a termination date listed on the form, or, if the spouse of the principal is designated as the attorney-in-fact, when proceedings commence for divorce, separation, or annulment of the marriage. The incapacity of the principal has no effect on the attorney-in-fact's authority.

If the box is checked stating that the power of attorney is not effective if the principal becomes incapacitated or incompetent, then it is not durable and it terminates on the incapacity of the principal, the death of the principal, revocation by the principal, the expiration of a termination date listed on the form, or, if the spouse of the principal is the attorney-in-fact, when proceedings commence for divorce, separation, or annulment of the marriage, whichever occurs first or the revocation by the principal, whichever occurs first.

If the statutory short form is not used, in order to be durable, the power of attorney must contain language such as "This power of attorney shall not be affected by the incapacity or incompetence of the principal" or similar words sowing the intent of the principal that the authority conferred is exercisable notwithstanding the principal's later incapacity or incompetence.

Multiple Attorneys-in-Fact

A principal may have more than one effective power-of-attorney form, giving authority to more than one attorney-in-fact. Therefore, there may be multiple attorneys-in-fact acting on the principal's behalf at any given time. For example, a mother could give power-of-attorney to her son and separately give power-of-

attorney to her daughter. A bank could deal with any of the appointed attorneys-in-fact individually, unless the bank had knowledge that one of the powers of attorney was no longer valid.

A principal may also appoint multiple attorneys-in-fact in a single power of attorney form. The principal must check a box on the statutory short form to indicate whether the attorneys-in-fact may act independently or must work jointly. If they are authorized to act independently, then either may deal with the bank as attorney-in-fact. If they are required to act jointly, then the bank may not act without authorization from all attorneys-in-fact named on the form.

The principal may choose to name a successor attorney-in-fact who is authorized to act only if the named attorney-in-fact dies, resigns, or is otherwise unable to serve. The statutory short form provides space to name a first successor and a second successor. A successor attorney-in-fact that wishes to act on behalf of the principal should provide the bank with an affidavit stating that he is authorized to act based on the death, incompetency or resignation of the attorney-in-fact and that the attorney-in-fact has died, has been declared incompetent, or has resigned.

Revocation
To be effective, a revocation must be in writing and signed by the principal. A conservator or guardian of a principal may revoke the power. A revocation is not effective against a third party unless that party has actual notice of the revocation. Actual notice in a real estate transaction means that the power of attorney was recorded with the county recorder. In a non-real estate transaction, actual notice means that a written instrument of revocation was received by the third party. It is important that a bank receiving a revocation notify the appropriate staff, since the entire staff may be deemed to have received notice once one employee receives the revocation.

Termination of Power
Once a power of attorney terminates, the attorney-in-fact has no authority to act on behalf of the principal. However, if the bank has no knowledge of the termination of the power of attorney, it should not be held liable for allowing the attorney-in-fact to continue to act.

Requiring Use of Bank's Form

Some banks have developed their own power of attorney form and, consequently, bank staff is more familiar with that form and the powers authorized therein. However, if a bank is presented with a statutory short form, it is required by statute to accept that form, rather than requiring that its own form be used. Under Minn. Stat. § 523.20, any party that refuses to accept a signed power of attorney statutory short form will be liable to the same extent as if it had refused to act on the principal's own behalf.

Stale Powers of Attorney

Some banks are refusing to accept powers of attorney that are more than a certain number of months old. Since powers of attorney do not expire unless there is an expiration date on the form, this practice is not authorized by statute. In fact, by their very nature, powers of attorney are designed to be continually effective unless terminated or revoked. Regardless of whether the attorney-in-fact presents a statutory short form or another form of power of attorney, the signature of a person as attorney-in-fact constitutes an attestation by the attorney-in-fact that he has no knowledge of the termination or revocation of the power of attorney at the time of the signing. It is conclusive proof for any party relying on the attestation that the power of attorney has not terminated or been revoked.

Use of Affidavits Signed by Attorney-in-Fact

If a bank is concerned about the effectiveness of a power of attorney, one option is to require an attorney-in-fact to sign an affidavit stating that the power of attorney has not been revoked or terminated by the principal's death, incapacity, or incompetence. A sample affidavit for use in real estate transactions may be found in Minn. Stat. § 523.17. Banks that require an affidavit in other types of transactions may occasionally meet with resistance from the attorney-in-fact, since the signature of the attorney-in-fact serves as conclusive proof for third parties that the power of attorney has not terminated or been revoked .

Liability

Statutory protection exists for any party accepting any valid power of attorney as long as the party has no actual knowledge that the power of attorney has been revoked or terminated. The signature of the attorney-in-fact serves as an attestation that the power of attorney has not been revoked or terminated. The bank may rely upon this attestation unless it has actual knowledge of facts to the contrary.

Liability for Refusing a Power of Attorney
A party that refuses to accept a power of attorney on the statutory short form is liable to the principal and the principal's heirs to the same extent as if the party had refused to allow the principal to act on the principal's own behalf. An example of damages that could result from an unreasonable refusal to accept a power of attorney might be the cost of getting a guardian appointed by the court to act instead of the attorney-in-fact. A bank should have a reasonable amount of time to have its counsel review any power of attorney form that appears questionable without it being considered a refusal.

Liability for Accepting a Power of Attorney
Any time a bank allows an attorney-in-fact to exceed his authority, it opens itself to liability. Banks should not forget that Minn. Stat. § 336.3-307 regarding notice of a breach of fiduciary duty may apply to situations where an attorney-in-fact exceeds his authority. For example, if an attorney-in-fact writes a check on the principal's account to pay the outstanding loan from the same bank to the attorney-in-fact, the bank may be on notice of a possible breach because the attorney-in-fact is dealing with the principal's funds for the attorney-in-fact's own personal benefit. However, there is no notice when the check is written by the attorney-in-fact to himself, because he may be using these funds for the principal's benefit, e.g., grocery shopping.

Banks may take the position that an attorney-in-fact is not authorized to add herself to the account as a P.O.D. beneficiary. Alternatively, if the principal checked the box under the third section of the statutory short form that authorizes attorneys-in-fact to give money to themselves, the bank may take the position that it should honor the beneficiary designation.

Unauthorized Practice of Law
Banks should refrain from helping customers complete a power of attorney form to avoid the unauthorized practice of law. Under Minn. Stat. § 481.02, non-lawyers giving legal advice or counsel, including helping a person fill out a legal form, may be guilty of a misdemeanor.

II. New Flood Form Must be Used After July 1, 2006

Use of the new version of FEMA Form 81-93, the Standard Flood Hazard Determination Form, is mandatory beginning July 1, 2006. The revised version has an expiration date of October 31, 2008 and is available at: http://www.fema.gov/business/nfip/sfhdform.shtm.