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New York State Assembly Passes Power of Attorney Technical Correction Bill: Implications for Funds and Fund Managers

Introduction

The New York State Assembly recently passed a bill intended to clarify the application of New York's Power of Attorney ("POA") law,[1] which was revised in significant respects on September 1, 2009. The Assembly bill amends the POA law to specifically exclude POAs granted primarily for business or commercial purposes and, if passed by the Senate and enacted into law, should eliminate most (if not all) effects that the September 1, 2009 changes to the law arguably had on POAs typically included in hedge fund and private equity fund subscription, partnership and other agreements. The bill would have retroactive effect to September 1, 2009.

The Current Law

As amended effective September 1, 2009, the current POA law appears to apply to POAs granted in business and commercial contexts in addition to POAs granted in personal financial/tax/estate planning contexts. Certain features of the current POA law that were added in the September 1, 2009 amendment include the following:

- *Form Requirements*. Covered POAs must comply with certain form requirements, including that they (i) be legibly printed in type at least 12 point in size (or equivalent if in writing), (ii) be signed and acknowledged before a notary by both the principal (*i.e.*, the grantor of the POA) and the agent (*i.e.*, the attorney-in-fact pursuant to the POA), and (iii) contain the precise wording of certain cautionary language (available here) describing the nature of the powers being created and the agent's duties to the principal.

[1] Title 15 of Article 5 of the New York General Obligations Law.

- *Revocation*. Each newly executed POA automatically revokes all POAs previously executed by the principal (except as otherwise provided in the new POA), and a principal may also revoke a POA at any time by delivering a written, signed and dated revocation to the agent.

- *Fiduciary Duty*. An agent under a POA is expressly stated to be a fiduciary for the principal with a duty to act in accordance with any instructions from the principal or, where there are no instructions, in the principal's best interest.

Although its applicability to POAs granted in business and commercial contexts is uncertain, the current POA law's apparent broad application arguably has implications for POAs typically included in hedge fund and private equity fund subscription, partnership and other agreements. Such POAs generally permit fund managers to execute certain documents and take certain other actions on behalf of investors, including, without limitation, to sign fund and alternative investment vehicle governing agreements, make certain governmental filings, apply for tax treaty benefits and utilize certain remedies in the event of a default by an investor.

The Technical Correction Bill

The New York State Assembly recently passed a bill to amend the current POA law, clarifying its application and making a number of other technical corrections to certain of the September 1, 2009 changes. ***The bill has retroactive effect to September 1, 2009 and, notably, excludes POAs granted primarily for business or commercial purposes from the POA law altogether.*** In addition, for POAs subject to the POA law, the bill reverses the presumption that newly executed POAs revoke all previously executed POAs.

Of particular significance to fund managers, the bill lists the following examples of excluded POAs given primarily for a business or commercial purpose (among others):

- "a power authorizing a financial institution or employee of a financial institution to take action relating to an account in which the financial institution holds cash, securities, commodities or other financial assets on behalf of the person giving the power;

- a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity in his or her capacity as such; [and]

- a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, declaration of condominium, condominium bylaws, condominium offering plan or other agreement or instrument governing the internal affairs of an entity authorizing a director, officer,

shareholder, member, unit owner, manager or other person to take lawful action relating to such entity."

The foregoing examples appear to specifically exclude the types of POAs typically included in hedge fund and private equity fund subscription, partnership and other agreements, as well as traditional separate account documentation, from the scope of the POA law. Thus, if the companion bill introduced in the New York State Senate and recently referred to its Judiciary Committee is passed and enacted into law, the effect should be to substantially eliminate the concerns of fund managers over the impact of the September 1, 2009 changes to the POA law. However, it should be noted that an earlier version of the recently passed Assembly bill was delivered to the Senate in June 2009 and died there in January 2010. In light of this history, there can be no assurance that the bill will, in fact, become law in its current form or at all.

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