

## INTERPRETIVE ISSUES RELATED TO RECENT CHANGES TO THE NEW YORK POWER OF ATTORNEY LAW

*On September 1, 2009, several amendments to the New York General Obligations Law §§ 5-1501 et seq. (the “Statute”) took effect. These amendments, enacted as a result of perceived abuses in elder care connected to financial matters, including estate planning<sup>1</sup>, changed the requirements for creating certain types of valid powers of attorney in New York, and, when read in isolation, appear potentially to have had the unintended consequence of invalidating a wide variety of common corporate, commercial and financial documents, thereby creating uncertainty for transactional business lawyers. This White Paper examines principles of New York and federal law to reach a finding that, at the least, substantial portions of the Statute (identified below) do not apply to (1) proxies for shares of New York corporations and non-New York corporations, (2) certain powers of attorney executed in connection with the registration of transfer of certificated securities<sup>2</sup> or (3) many powers of attorney granted in connection with the formation and governance of non-New York limited liability companies and non-New York limited partnerships (collectively, “Foreign Entities”).*

### **Introduction**

This White Paper discusses the applicability of the Statute to proxies for shares of corporations, powers of attorney executed in connection with the registration of transfer of certificated securities and to many powers of attorney granted in connection with the formation and governance of Foreign Entities (collectively, the “Covered Issues”). Currently, a technical corrections act that addresses a variety of concerns regarding the Statute is pending in the New York State Legislature, but it does not deal precisely with the Covered Issues.<sup>3</sup> In addition, there are other efforts under way to amend the Statute to clarify its application.<sup>4</sup> We strongly support these efforts and believe there is an urgent need for reform of the Statute because there are many areas in which the application of the Statute would be inconsistent with standard commercial arrangements that do not implicate the abuses intended to be remedied by the Statute. Most of these concerns are beyond the scope of this White Paper.

The purpose of this White Paper is to provide a blueprint for a consensus among practitioners on the Covered Issues. By limiting our discussion to the Covered

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<sup>1</sup> This White Paper uses the term “estate planning” as it relates to the Statute as a general description for management of an individual’s personal and financial affairs, including gift and estate tax planning as well as management for non-tax purposes.

<sup>2</sup> For the purposes of this White Paper, powers of attorney granted in connection with the registration of transfer of securities include, but are not limited to, stock or note powers, indorsements on security certificates and powers of attorney granted in letters of transmittal related to tender offers and mergers.

<sup>3</sup> See S. 5910, 232d Leg., 2009-2010 Reg. S. Sess. (N.Y. June 18, 2009, available at <http://assembly.state.ny.us/>). It is unclear whether and when the technical corrections act will be adopted, and the corrections address only some of the problems with the Statute.

<sup>4</sup> In particular, the New York State Bar Association has been working on proposed amendments to the Statute.

Issues, however, we do not mean to diminish the importance of the numerous other commercial arrangements as to which the Statute has created unnecessary confusion and disruption.<sup>5</sup>

## Background

The Statute governs powers of attorney executed by individuals while physically present in New York and provides detailed requirements for how individuals may delegate decision-making authority over their property. The Statute aims to prevent principals, in the estate planning context, from delegating powers to agents without fully recognizing the scope of those powers, and to discourage fraudulent behavior by agents.<sup>6</sup> The Statute defines a power of attorney as “a written document by which a principal with capacity designates an agent to act on his or her behalf”, and an “agent” as “a person granted authority to act as attorney-in-fact for the principal under a power of attorney”.<sup>7</sup> This broad categorization, viewed in isolation, could result in the unintended effect of subjecting many routine commercial transactions to the Statute, including, specifically with regard to this White Paper, the special agency relationships created in the context of the Covered Issues.<sup>8</sup> This White Paper concludes that, consistent with New York’s customary and long-standing principles of statutory interpretation and the internal affairs doctrine, the Statute (or at least substantial portions of it identified below) does not apply to the Covered Issues.

## Proxies for New York Corporations

The principles of statutory construction generally applied in New York provide that a later enacted general statute does not repeal or supersede a previously

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<sup>5</sup> We recognize that the principles of statutory interpretation utilized in this White Paper could apply in other situations relating to the potential impact of the Statute. We also recognize that the breadth of the application of the Statute in other situations may be limited by applicable federal law (including preemption) and practice.

<sup>6</sup> Tellingly, the Statute was renamed “Statutory Short Form and Other Powers of Attorney for Financial Estate Planning” instead of “Statutory Short Form Power of Attorney”. *See* S. 5910, 232d Leg., 2009-2010 Reg. S. Sess. (N.Y. June 18, 2009). The New York State Law Revision Commission’s *2008 Commentary to the Proposed Revisions to the General Obligations Law Powers of Attorney* states that this “amended title clarifies the general understanding that the general obligations law governs only powers of attorney that individuals create to appoint a person to assist them in personal financial and estate matters.” The Commission’s Commentary is available online at [http://www.lawrevision.state.ny.us/reports/revised\\_final\\_commentary\\_2008.pdf](http://www.lawrevision.state.ny.us/reports/revised_final_commentary_2008.pdf).

<sup>7</sup> N.Y. GEN. OBLIG. LAW § 5-1501 (2009).

<sup>8</sup> Powers of attorney are used regularly in commercial transactions, such as loan transactions allowing a creditor to exercise rights over collateral, stock powers, proxies, limited partnership, limited liability company and subscription agreements for investment funds that create powers of attorney in favor of the general partner or managing member, investment advisory agreements and powers of attorney executed in connection with routine Securities and Exchange Commission or tax-related filings. For securities law related filings, powers of attorney are used in registration statements filed under the Securities Act of 1933; periodic reports filed under the Securities Exchange Act of 1934; statements of beneficial ownership on Schedules 13D and 13G filed under the Securities Exchange Act of 1934; and on Forms 3, 4 and 5 filed under Section 16 of the Securities Exchange Act of 1934.

enacted specific statute on the same subject absent manifest, specific legislative intent directing such an outcome.<sup>9</sup> This principle is based on a presumption against implied repeal of a statutory enactment. Implied repeal should only be found where there is an unambiguous legislative intent directing such an outcome, which is manifested in a specific declaration, or if the contents of the later statute make clear the legislature's intent to make ineffective (as far as the later statute is concerned) the earlier statute.<sup>10</sup>

New York Business Corporation Law (“NYBCL”) § 609 is clearly a specific statute governing the special agency relationship created by a shareholder in a New York corporation who authorizes another person in writing to vote on his or her behalf at a shareholders’ meeting.<sup>11</sup> The later enacted Statute relates to the broad, general area of written agency relationships.<sup>12</sup> The Statute provides very specific requirements for the format and execution of a valid power of attorney, including providing for the inclusion of certain legends in a power of attorney regarding the principal and the agent.<sup>13</sup> In clear contrast, NYBCL § 609(i) provides a very different, non-exclusive list of ways for creating a valid proxy that is clearly inconsistent with the Statute.<sup>14</sup> A key issue of inconsistency between the Statute and NYBCL § 609 related to validity lies in the express requirement in the Statute that a power of attorney be executed with the manual, notarized signatures of the principal and the agent and that it contain a substantial amount

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<sup>9</sup> “[T]he enactment of a general law broad enough in scope and application to cover the field of operation of a special or local statute generally does not repeal a statute limited in operation to a particular phase of the subject covered by the general law...” J. Norman & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 23:15, Vol. 1A (7th ed. 2009). See also *Grimmer v. Tenement House Department of the City of New York*, 204 N.Y. 370, 378 (1912); *People ex rel. Leary v. Knox*, 166 N.Y. 444, 448-49 (1901); *Harris v. Jacobs*, 329 N.Y.S.2d 229, 234 (Sup. Ct. 1972); *People v. Pierson*, 13 N.Y.S. 365, 365-66 (Sup. Ct. 1891). *People v. Pierson* also supports the conclusion that, where inconsistent, the requirements of a later general act are not deemed added to the requirements of a previously enacted special act.

<sup>10</sup> *People ex rel. Leet v. Keller*, 157 N.Y. 90, 97 (1898); *People ex rel. Klipper v. Ellinger*, 239 A.D. 647, 650 (App. Div. 1934); *Matter of Morris v. Neider*, 259 A.D. 49, 53 (App Div. 1940). See also J. Norman & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 23:10, Vol. 1A (7th ed. 2009). See also *Cimo v. State of New York*, 306 N.Y. 143, 148-49 (1953); *People ex rel. Savory, Inc. v. Plunkett*, 295 N.Y. 180, 183 (1946); *People ex rel. Fleming v. Dalton*, 158 N.Y. 175, 184 (1899); *Waldes v. State Tax Commission*, 17 A.D. 2d 47, 50 (App. Div. 1962); *People ex rel. Shipston v. Thompson, et al.*, 187 N.Y.S. 395, 397 (Sup. Ct. 1921). In *People ex rel. Shipston v. Thompson, et al.* the court found that where two statutes cover, in whole or in part, the same subject matter and are not inconsistent, effect will be given to both. In that case, the court went on to decide that a later enacted specific statute controlled rather than an earlier enacted general statute because of the inconsistency between the statutes in question.

<sup>11</sup> For purposes of this White Paper, our analysis focuses on proxies granted by the actual shareholder to act at a shareholders’ meeting or to express consent or dissent without a meeting.

<sup>12</sup> The inapplicability of the Statute to oral authorizations can be important in some situations involving proxies for book-entry securities.

<sup>13</sup> N.Y. GEN. OBLIG. LAW § 5-1501B (2009). The required legends include (i) a cautionary statement to the principal regarding the potential scope of authority that may be granted to the agent and (ii) a notice to the agent regarding his fiduciary duties to the principal, which arise from the power of attorney. These legends must contain the exact wording provided in the Statute.

<sup>14</sup> N.Y. BUS. CORP. LAW § 609 (i) (2003).

of invariable wording.<sup>15</sup> On the other hand, NYBCL § 609(i) provides that, to create a valid proxy, signature by a principal may be executed “by any reasonable means”, including “by facsimile signature.”<sup>16</sup> In each case, NYBCL § 609 clearly does not require notarization under any circumstances and, in the case of a facsimile signature, notarization is not even legally permissible. Furthermore, NYBCL § 609(i)(2) does not require any form of signature at all for certain types of electronic proxies.<sup>17</sup> In addition, NYCBL § 609(i) does not require any legends or signatures of the agent.

The Statute and NYBCL § 609 are also inconsistent in how they treat the duration of the instruments they regulate and the revocability of those instruments. First, NYBCL § 609 expressly states that, unless otherwise provided, “no proxy shall be valid after the expiration of eleven months from the date thereof”.<sup>18</sup> The Statute directly conflicts with this by providing that all powers of attorney continue without a specified limitation as to time unless otherwise indicated or they are terminated.<sup>19</sup> Second, NYBCL § 609 allows shareholders to create irrevocable proxies and provides parameters for the applicability of such irrevocable proxies and their duration.<sup>20</sup> The Statute takes the opposite approach by providing that powers of attorney are generally revocable.<sup>21</sup> In addition, the Statute codifies a presumption of the revocability of a power of attorney by stating that each time the principal of a prior power of attorney enters into a new power of attorney in New York after September 1, 2009, “any and all prior powers of attorney executed by the principal” will be revoked unless the new power of attorney expressly provides otherwise.<sup>22</sup>

Despite the inconsistencies discussed above, there is no evidence whatsoever of legislative intent supporting the application of the Statute to proxies. While the Statute diverges from the Uniform Power of Attorney Act, the legislative record presents no evidence of the intent to have the Statute govern proxies.<sup>23</sup> In fact, the evidence is to the contrary, as the explicit motivation provided by the New York State Legislature for the recent amendments to the Statute was specifically to remedy issues related to perceived abuse in elder care connected to estate planning.<sup>24</sup> Moreover, the

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<sup>15</sup> N.Y. GEN. OBLIG. LAW § 5-1501B (2009).

<sup>16</sup> N.Y. BUS. CORP. § 609(i) (2003). The statutory language provides considerable flexibility. As written, a shareholder may (but is not required to) execute “a writing” authorizing another person to act for such shareholder as a proxy.

<sup>17</sup> *Id.*

<sup>18</sup> N.Y. BUS. CORP. LAW § 609(b) (2003).

<sup>19</sup> N.Y. GEN. OBLIG. LAW § 5-1501A and § 5-1511 (2009).

<sup>20</sup> N.Y. BUS. CORP. LAW § 609 (f)-(h) (2003).

<sup>21</sup> N.Y. GEN. OBLIG. LAW § 5-1511(3) (2009).

<sup>22</sup> N.Y. GEN. OBLIG. LAW § 5-1511(6) (2009).

<sup>23</sup> The Uniform Power of Attorney Act carves out voting proxies from its provisions and excludes commercial and business transactions from its coverage. Commentary to the Uniform Power of Attorney Act § 103 (2006).

<sup>24</sup> *See* S. 5910, 232d Leg., 2009-2010 Reg. S. Sess. (N.Y. June 18, 2009).

New York State Law Revision Commission's 2008 *Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney*<sup>25</sup> stated that the powers of attorney used in commercial and business transactions were beyond the scope of the Commission's Recommendation.<sup>26</sup> The Statute itself prescribes a "Caution to Principal" legend which would characterize the power of attorney in a manner entirely inapplicable to proxies, thus reinforcing the conclusion that the Statute was not intended to govern them.<sup>27</sup> In addition, the flexibility in the execution and transmission of proxies expressly permitted by NYBCL § 609, the permissible brevity of wording and the lack of specific wording requirements reflect vital business realities and the public interest in facilitating the delivery of proxies. Ultimately, the legislative history establishes that it is implausible that the New York State Legislature intended the Statute to apply to areas other than in the estate planning context.

Accordingly, the proper application of New York's principles of statutory interpretation leads to the following conclusions:

- A proxy for a New York corporation that is valid under NYBCL § 609 is valid even if it does not comply with the Statute.
- The validity of any proxy, whether or not created by its terms under the Statute, will be properly determined by reference to NYBCL § 609.
- NYBCL § 609(b) controls the duration of a proxy for a New York corporation.
- A proxy for a New York corporation that is irrevocable under NYBCL § 609 is irrevocable notwithstanding the Statute.

### **Conflicts of Law and Proxies for Non-New York Corporations**

Under the Statute, all powers of attorney executed outside New York will be valid in New York provided that they comply with the laws of the state of execution or the laws of New York, even if the principal is a New York resident.<sup>28</sup> With regard to New York corporations, this means that the Statute would not apply to proxies for meetings of their shareholders if executed outside New York (and in compliance with the local law of the place of execution), independently of the arguments set forth above.

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<sup>25</sup> The Commission's Recommendation is available online at [http://www.lawrevision.state.ny.us/reports/2008\\_Recommendation\\_re\\_General\\_Obligations\\_Law\\_May\\_26\\_2008.pdf](http://www.lawrevision.state.ny.us/reports/2008_Recommendation_re_General_Obligations_Law_May_26_2008.pdf)

<sup>26</sup> *Id.* at 5 n4.

<sup>27</sup> N.Y. GEN. OBLIG. LAW § 5-1513(a) (2009). The legend describes a grant to an agent of "authority to spend your money and sell or dispose of your property during your lifetime without telling you."

<sup>28</sup> N.Y. GEN. OBLIG. LAW § 5-1512 (2009).

With regard to the proxies for non-New York corporations that are executed by individuals while physically present in New York, and thus potentially governed by the Statute, a court should apply the internal affairs doctrine. The internal affairs of a corporation involve “matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.”<sup>29</sup> The internal affairs doctrine states that issues related to a corporation’s internal affairs are generally decided under the laws of the corporation’s state of incorporation.<sup>30</sup> This policy preserves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.<sup>31</sup> While there is some uncertainty as to whether the internal affairs doctrine, as a conflict of laws rule, has a constitutional basis, that uncertainty is not relevant in this instance. Even if the New York State Legislature has the constitutional authority to pass a law that regulates the form, validity and revocability of proxies for non-New York corporations, the Statute would have to be explicit to do so.<sup>32</sup> The Statute says nothing in this regard.<sup>33</sup> Accordingly, absent a finding of any express intent to the contrary, a New York court should apply the laws of a corporation’s state of incorporation as controlling with regard to proxies for the corporation.

The Statute should not determine the validity of proxies for non-New York corporations because the internal affairs doctrine is broadly applicable throughout the U.S. and dictates that states must look to the laws of the jurisdiction of incorporation when interpreting proxy requirements for corporations.<sup>34</sup> In the seminal case of *Burks v. Lasker*, the United States Supreme Court stated that corporations fundamentally “are creatures of state law” and that state law generally governs their affairs.<sup>35</sup> In so doing, the Court recognized the paramount interest a state of incorporation has over the voting

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<sup>29</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

<sup>30</sup> *CRTF Corp. v. Federated Dept. Stores, Inc.*, 683 F. Supp. 422, 427-28 (S.D.N.Y. 1988); *Prescott v. Plant Industries, Inc.*, 88 F.R.D. 257, 261-62 (S.D.N.Y. 1980); *Hart v. General Motors Corp.*, 129 A.D. 2d 179, 182-84 (N.Y. App. Div. 1987).

<sup>31</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmts. a, e (1971). Comment a refers specifically to “methods of voting” as governed by the law of the state of incorporation.

<sup>32</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmts. a, e (1971).

<sup>33</sup> See N.Y. BUS. CORP. LAW § 1317 (2003) for an example of a New York statutory provision that explicitly purports to regulate a matter of the internal affairs of a non-New York corporation.

<sup>34</sup> The analysis in this section includes corporations incorporated outside the United States, as the internal affairs doctrine has been held applicable to such foreign corporations. See *Tomran, Inc. v. Passano*, 391 Md. 1, 7-8 (Md. 2006) (the court relied on *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982), a Supreme Court case that ruled generally on the internal affairs doctrine, and held that Irish law governed an action brought against the directors of a Baltimore bank, the Delaware holding company that owned the Baltimore bank, and the Irish corporation that owned the Delaware holding company). For purposes of this White Paper, we have assumed that the laws of the jurisdiction of incorporation of the relevant non-New York corporation do not themselves require compliance with the law of the jurisdiction in which the proxy is actually executed and, particularly in the case of foreign corporations, that the relevant jurisdiction has laws that regulate shareholder voting under a notion similar to that in the United States as to what constitutes the internal affairs of a corporation.

<sup>35</sup> 441 U.S. 471, 478 (1979).

process of a corporation.<sup>36</sup> The Court has also stated that “[n]o principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations, including the authority to define the voting rights of shareholders”.<sup>37</sup>

The proper application of the internal affairs doctrine leads to the conclusion that the Statute is not applicable to proxies for non-New York corporations.

### **Certain Powers of Attorney in Connection with the Registration of Transfer of Certificated Securities**

The broad language of the Statute opens up the possibility of extending its application to the special agency relationships created by powers of attorney executed in connection with the registration of transfer of certificated securities. For example, in the case of the power of attorney granted in a letter of transmittal, a securityholder consenting to the applicable terms and conditions of a relevant offer grants a power of attorney to an agent. The agent is authorized only to transfer ownership of certificates representing ownership interests in the subject security of a corporation, present such certificates for transfer and exercise all rights of beneficial ownership evidenced by such certificates on behalf of the tendering securityholder.<sup>38</sup> As in the case of a proxy, the special agency relationship created by an indorsement is a critical component of a set of well-established, fundamental commercial legal practices and relationships such that the Statute should not be read to apply here.

The registration of transfer of certificated securities is generally governed by the Uniform Commercial Code (the “UCC”), as in effect in the various States. Broadly speaking, a transfer may be achieved through the transferor delivering the certificate together with an “indorsement.”<sup>39</sup> The powers of attorney at issue are intended to function as indorsements under the UCC, and their validity should be viewed in this light.<sup>40</sup>

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<sup>36</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 (1971) (concluding that the law of the incorporating state generally should “determine the right of a shareholder to participate in the administration of the affairs of the corporation”). Comment c. refers to the important objective of uniform treatment of shareholders, including with respect to “the manner in which they may vote, such as by . . . proxy”.

<sup>37</sup> *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987). In *CTS*, the issue was whether an Indiana statute effectively permitting shareholders to condition acquisition of control of a corporation on approval of a majority of disinterested shareholders conflicted with the Williams Act and was thus pre-empted under federal law. The Court concluded that so long as only the state of incorporation regulated the voting process for a corporation, it would not create a risk of inconsistent application, and affirmed the Indiana statute.

<sup>38</sup> Many letters of transmittal also grant proxies. The analysis of proxies is set forth above in this White Paper.

<sup>39</sup> U.C.C. § 8-102(11) (2001).

<sup>40</sup> Uniform Commercial Code, §§ 8-301, 8-401(a)(2) (2001). For purposes of this White Paper, our analysis focuses on powers intended to function as indorsements (i.e., those granted by “appropriate persons”, as defined in N.Y. U.C.C. § 8-107 (2001)) and does not extend to powers of attorney that

### *Choice of Law*

The New York Uniform Commercial Code (the “NY-UCC”) provides a specific choice of law provision, which states that certain matters executed in connection with the transfer of securities governed by Article 8 are governed by “the local law of the issuer’s jurisdiction”.<sup>41</sup> Under NY-UCC § 8-110, the local law of the issuer’s jurisdiction governs, among other things, the validity of a security, rights and duties of the issuer with respect to registration of transfer, and the effectiveness of registration of transfer by the issuer.<sup>42</sup> The rights and duties of an issuer with respect to registration of transfer of certificated securities include the issuer’s right to require assurances that any necessary indorsement is genuine and authorized.<sup>43</sup> “Issuer’s jurisdiction” is defined as “the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. . .”<sup>44</sup> By virtue of NY-UCC § 8-110, and its analogous provisions in the UCC of other States, the question of the legal effectiveness of an indorsement (including its formal validity and revocability) with respect to the certificated securities of a non-New York issuer generally<sup>45</sup> is not a question of New York law even if the indorsement is executed in New York.

Accordingly, the Statute does not apply to a power of attorney intended to function as an indorsement in connection with the registration of transfer of a certificated security issued by a non-New York issuer.

### *Securities of New York Corporations*

The transfer of certificated securities of New York corporations would generally be governed by the NY-UCC and may be achieved through the transferor delivering the certificate together with an indorsement.<sup>46</sup> This situation presents a specific statute (the NY-UCC) that provides clear rules with respect to a special relationship created by a written instrument (in this case, a power that meets the NY-UCC requirements for an indorsement) and a subsequent general statute (the Statute) that

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authorize agents to execute indorsements on behalf of a principal (i.e., those granted to “representatives”, as defined in § 1-201(35) of the Uniform Commercial Code (2001)). We are aware that N.Y. GEN. OBLIG. LAW § 5-1502C (2009) gives meaning to the phrase “bond, share and commodity transactions” when used in a statutory short form power of attorney, but we do not believe that this affects the analysis in this White Paper with respect to its focus on indorsements.

<sup>41</sup> N.Y. U.C.C. § 8-110(a) (2001). Commentary to this section specifies that the phrase “local law” refers to the law of the issuer’s jurisdiction other than its conflict of law rules.

<sup>42</sup> N.Y. U.C.C. § 8-110(a) (2001).

<sup>43</sup> N.Y. U.C.C. § 8-402 (2001).

<sup>44</sup> N.Y. U.C.C. § 8-110(d) (2001).

<sup>45</sup> Pursuant to N.Y. U.C.C. § 8-110(d) (2001), a non-New York corporation may select the governance of a jurisdiction other than its jurisdiction of incorporation. For purposes of this White Paper, we assume that the relevant issuer has not elected New York as its jurisdiction.

<sup>46</sup> N.Y. U.C.C. §§ 8-301, 8-401(a) (2001).



sets forth inconsistent, general rules. In the absence of evidence of legislative intent to repeal or override the NY-UCC, the NY-UCC (as the specific statute) prevails on points of inconsistency.

The NY-UCC provides that an indorsement is “a signature that. . . is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer or redeem it”.<sup>47</sup> The breadth of this definition provides great flexibility in the creation and validity of an indorsement, akin to that of NYBCL § 609 with respect to its treatment of proxies, that sharply contrasts with the specific requirements for the validity of a power of attorney under the Statute (as discussed earlier). The NY-UCC provides that an indorsement “may be in blank”.<sup>48</sup> Second, the combined effect of NY-UCC §§ 8-401 and 8-402 is that an issuer is not entitled to reject an indorsement merely because the indorsement is not notarized. Third, on the issue of revocability, NY-UCC § 8-107(e) provides that “an indorsement. . . does not become ineffective by reason of any later change of circumstances”, which underscores the clear presumption in NY-UCC § 8-402 that an indorsement is not ordinarily revocable once delivered to a purchaser or issuer.<sup>49</sup> The NY-UCC also imposes specific rules with respect to the rights of an issuer to seek assurances as to the validity of an indorsement and the authority of the signer.<sup>50</sup> Finally, the NY-UCC also has rules with respect to “signature guarantees”, designed to give assurances as to the genuineness of signatures on indorsements.<sup>51</sup> These NY-UCC rules are inconsistent with the previously discussed aspects of the Statute (*i.e.*, the form, revocability and validity of powers of attorney).

In addition to these issues, the Statute is ambiguous in how it relates to the special agency relationship created by a NY-UCC indorsement, which is distinguishable from the type of agency relationships intended to be governed by the Statute. The Statute provides in the definition of an “agent” that “an agent acting under a power of attorney has a fiduciary relationship with the principal.”<sup>52</sup> It is unclear whether this sentence is

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<sup>47</sup> N.Y. U.C.C. § 8-102 (2001).

<sup>48</sup> N.Y. U.C.C. § 8-304(a) (2001).

<sup>49</sup> N.Y. U.C.C. §§ 8-107(e), 8-402 (2001). Comment 1 to § 8-402 supports this conclusion by stating that “an issuer is absolutely liable for wrongful registration of transfer if the indorsement or instruction is ineffective. . . Accordingly, an issuer is entitled to require such assurance as is reasonable under the circumstances that all necessary indorsements are effective, and thus to minimize the risk”, but none of the exhaustive items of assurances authorizes a request for evidence of non-revocation. Further to this point, “protected purchasers” (as defined in N.Y. U.C.C. § 8-303 (2001)) that take delivery of an indorsed security certificate (thus establishing “control” of the certificate, as defined under N.Y. U.C.C. § 8-106 (2001)) and satisfy the requirements of N.Y. U.C.C. § 8-303 (2001), are not subject to adverse claims. Subject to the other requirements of N.Y. U.C.C. § 8-401 (2001), such a “protected purchaser” is entitled to have the issuer register the transfer. This entire scheme would be undermined if a seller, after the sale (even to a “protected purchaser”) has been completed, could block the registration of transfer by revoking the power that constitutes the indorsement.

<sup>50</sup> N.Y. U.C.C. § 8-402 (2001).

<sup>51</sup> N.Y. U.C.C. §§ 8-306, 8-402(a)(1) (2001).

<sup>52</sup> N.Y. GEN. OBLIG. LAW § 5-1501 (2009).

limiting (*i.e.*, a person cannot be an “agent” under the Statute unless that person has a fiduciary duty to the principal derived from law other than the Statute) or prescriptive (*i.e.*, the sentence imposes fiduciary duties). This ambiguity is compounded by other provisions in the Statute that purport to impose fiduciary duties<sup>53</sup> and is particularly acute in situations in which it would be unfounded to hold an agent owes a fiduciary duty to the principal, such as the case of NY-UCC indorsements. Under NY-UCC indorsements, agents are not subject to fiduciary duties and merely perform ministerial acts with no provision for meaningful discretion and consequently with none of the substance of a fiduciary duty. In light of this ambiguity, applicable principles of statutory interpretation authorize us to look to legislative history, including the title of the Statute, to clarify the applicability of the Statute to this context.<sup>54</sup> We find no evidence of the New York State Legislature’s intent for the registration of transfer of a certificated security to be governed by the Statute and not the NY-UCC. To the contrary, it is obvious that, as already discussed in this White Paper, the explicit motivation of the New York State Legislature in amending the Statute was to remedy issues limited to the context of estate planning.

We also believe it is appropriate to consider that it is the NY-UCC that would be subject to implied amendment by the Statute if the Statute were to be applied to matters already addressed in the NY-UCC. The UCC, the basis of the NY-UCC, is a statute of great national prominence and importance.<sup>55</sup> The NY-UCC provisions related to indorsements are a critical part of the longstanding network of well-established, fundamental commercial legal practices and relationships. In addition, the certainty, stability and predictability of the system for transferring securities is a vital interest of New York in light of its status as a global financial center. Both these facts support the conclusion that we should be very reluctant to interpret the Statute as impliedly amending the NY-UCC to impose additional requirements as to the form of a valid indorsement in the absence of evidence that the New York State Legislature intended the Statute to apply to NY-UCC indorsements.

The proper application of New York’s principles of statutory interpretation leads to the following conclusions:

- An indorsement that meets the requirements of the NY-UCC is valid even if it does not meet the requirements of the Statute.

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<sup>53</sup> N.Y. GEN. OBLIG. LAW § 5-1505(2) (2009).

<sup>54</sup> See, *e.g.*, *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co. et al.*, 331 U.S. 519, 527-28 (1947); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 473 (1992).

<sup>55</sup> See, *e.g.*, the various links to amendments of the Uniform Commercial Code at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ucc1>. An amendment to the Uniform Commercial Code is a process of significant national magnitude undertaken by the American Law Institute and the National Conference of Commissioners of Uniform Laws via a drafting committee of nearly a dozen scholars from different states, in conjunction with advisement of the American Bar Association, which takes many months and involves several rounds of drafts and comments.

- An issuer may not refuse to register a transfer of a certificated security merely because the indorsement does not comply with the Statute.

### **Powers of Attorney for Foreign Entities**

Existing New York laws provide that the organization and internal affairs of a Foreign Entity are governed by the laws of the jurisdiction of the respective entity's formation.<sup>56</sup> While the scope of this White Paper does not extend to identifying all matters that may constitute the "organization and internal affairs" of a Foreign Entity, our conclusion is that, based upon these statutory provisions, powers of attorney that relate to the organization of a Foreign Entity and powers of attorney executed to enable responsible persons authorized by the respective governing documents of a Foreign Entity to more effectively exercise their management authority and administer the affairs of the entity are not subject to the Statute.<sup>57</sup>

### **Suggested Language for Inclusion in Certain Instruments**

In light of the uncertainty introduced by the Statute, we raise for consideration by practitioners the following language for inclusion in proxies or proxy statements, powers intended to function as indorsements in connection with the registration of transfer of certificated securities and powers of attorney relating to Foreign Entities.

#### *Choice of Law*

As discussed earlier, with regard to proxies of non-New York corporations, powers intended to function as indorsements in connection with the registration of transfer of certificated securities of a non-New York issuer and powers of attorney related to the internal affairs of Foreign Entities, New York choice of law rules generally dictate that the laws of the relevant jurisdiction govern such instruments, and thus that the Statute should not apply. If such choice of law rules are applicable, parties may wish to reinforce those rules by the inclusion of a specific choice of law provision in such instruments that is consistent with those rules. Such a provision can be drafted in any number of ways, and we believe the following language can, depending on the laws that are relevant to the applicable issuer/entity, be effective:

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<sup>56</sup> N.Y. LTD. LIAB. CO. LAW § 801 (2007) (stating that "laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs and the liability of its members and managers"); and N.Y. P'SHIP LAW § 121-901 (2007) (stating that "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners").

<sup>57</sup> We express no view in this White Paper with regard to the effect of a rule under the laws of the jurisdiction of formation of a Foreign Entity that selects the place of execution (in this case, New York) as the law applicable to the validity of a power of attorney governing the "organization and internal affairs" of the Foreign Entity in question.

Proxies: [This] [Any] proxy will be governed by and construed in accordance with the laws of [insert state of incorporation of the issuer] and applicable federal securities laws.

Indorsements: This power will be governed by and construed in accordance with the laws of [insert state of formation of the issuer or the law chosen by the issuer to govern registration of transfer].

Foreign Entity Powers: This power of attorney will be governed by and construed in accordance with the laws of [insert state of formation of the entity].

#### *Automatic Revocation*

Notwithstanding the conclusions of this White Paper with regard to the applicability of the Statute to the Covered Issues, a question remains as to whether the effect of the Statute is to cause the execution of a proxy, an indorsement or a power of attorney related to the internal affairs of a Foreign Entity (even if not regulated by the Statute) to automatically revoke other, revocable, powers of attorney properly executed under New York law. While there are good arguments that the effect of the Statute is not to do so, the Statute permits a person to clarify that a subsequent instrument does not revoke a prior power of attorney.<sup>58</sup> To the extent of the concern raised by this question, we suggest the following language as one way to address this issue:

Proxies: The execution of [this] [a] proxy is not intended to, and does not, revoke any prior proxies or powers of attorney other than the revocation, in accordance with the [insert title of applicable state incorporation statute] and applicable federal securities laws, of any proxy previously granted specifically in connection with the voting of the shares subject [t]hereto.

Indorsements: The execution of this power is not intended to, and does not, revoke any prior proxies or powers of attorney other than the revocation, in accordance with applicable laws, of any proxy or power of attorney previously granted specifically in connection with the securities subject hereto.

Foreign Entity Powers: The execution of this power of attorney is not intended to, and does not, revoke any prior powers of attorney.

The undersigned firms concur in the above conclusions (recognizing that there is limited legislative history and a lack of official guidance, and that advice in any situation is dependent on the particular facts and circumstances). By concurring in the conclusions, the undersigned do not necessarily agree on all aspects of the analysis or give them equal weight or agree that the conclusions set forth herein would necessarily permit practitioners to render unqualified legal opinions with respect to the Covered Issues. None of the firms subscribing to this document intends thereby to give legal

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<sup>58</sup> N.Y. GEN. OBLIG. LAW § 5-1511(6) (2009).

advice to any person. The views expressed in this White Paper are the views of the undersigned and not the clients that they represent from time to time and are not intended to address any specific matter on which any of the firms may be advising or in which any of the firms may be appearing on behalf of their clients. Any person subject to the Statute should consult with an attorney in any situation in which there may be an issue as to the meaning or scope of the Statute, including situations that may appear to be identical or similar to those described herein.

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| Akin Gump Strauss Hauer & Feld LLP           | Kirkland & Ellis LLP                         |
| Bryan Cave LLP                               | Kramer Levin Naftalis & Frankel LLP          |
| Cadwalader, Wickersham & Taft LLP            | Latham & Watkins LLP                         |
| Cahill Gordon & Reindel LLP                  | Mayer Brown LLP                              |
| Chadbourne & Parke LLP                       | Milbank, Tweed, Hadley & McCloy LLP          |
| Cleary Gottlieb Steen & Hamilton LLP         | Morgan, Lewis & Bockius LLP                  |
| Clifford Chance US LLP                       | O'Melveny & Myers LLP                        |
| Covington & Burling LLP                      | Patterson Belknap Webb & Tyler LLP           |
| Cravath, Swaine & Moore LLP                  | Paul, Hastings, Janofsky & Walker LLP        |
| Davis Polk & Wardwell LLP                    | Paul, Weiss, Rifkind, Wharton & Garrison LLP |
| Debevoise & Plimpton LLP                     | Quinn Emanuel Urquhart Oliver & Hedges, LLP  |
| Dechert LLP                                  | Ropes & Gray LLP                             |
| Dewey & LeBoeuf LLP                          | Schulte Roth & Zabel LLP                     |
| Dickstein Shapiro LLP                        | Shearman & Sterling LLP                      |
| DLA Piper US LLP                             | Sidley Austin LLP                            |
| Edwards Angell Palmer & Dodge LLP            | Simpson Thacher & Bartlett LLP               |
| Fried, Frank, Harris, Shriver & Jacobson LLP | Skadden, Arps, Slate, Meagher & Flom LLP     |
| Gibson, Dunn & Crutcher LLP                  | Stroock & Stroock & Lavan LLP                |
| Goodwin Procter LLP                          | Sullivan & Cromwell LLP                      |
| Greenberg Traurig LLP                        | Wachtell, Lipton, Rosen & Katz               |
| Hughes Hubbard & Reed LLP                    | Weil Gotshal & Manges LLP                    |
| Jones Day                                    | White & Case LLP                             |
| Katten Muchin Rosenman LLP                   | Willkie Farr & Gallagher LLP                 |
| Kaye Scholer LLP                             | Wilmer Cutler Pickering Hale and Dorr LLP    |
| Kelley Drye & Warren LLP                     | Winston & Strawn LLP                         |
| King & Spalding LLP                          |  |

January 19, 2010