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PENNSYLVANIA'S REVISED POWER OF ATTORNEY ACT:

MAJOR CHANGES MAY NOT NECESSITATE REVISING YOUR POWER OF ATTORNEY

You may have read about the overhaul of the Pennsylvania laws governing Powers of Attorney used for financial and property transactions. Even though the revisions are extensive, your current Power of Attorney may be perfectly fine. Here is what you need to know to ensure that your documents are valid and effective under the new law.

To begin with, a Power of Attorney executed prior to January 1, 2015 is valid under the new law so long as it met the statutory requirements in force at the time of execution. In addition, Obermayer and other firms already observed best practices prior to 2015 that satisfy the new execution requirements. For example, under the new law, a Power of Attorney must be witnessed by two individuals neither of whom is an appointed agent or the notary signing the acknowledgment, and the instrument must be notarized. These are standard practices for Obermayer. Therefore, your older Power of Attorney likely satisfies these new requirements.

For years, the first page of the Power of Attorney has consisted of a notice to the principal which imparts the importance of the document. The new law revises the mandatory notice and incorporates a warning that the document may grant the agent the power to give away the principal's property or change how the property will be distributed at death. The principal is advised to seek the advice of an attorney before signing the Power of Attorney. While these changes are important, financial institutions cannot refuse to accept a Power of Attorney executed prior to January 1, 2015 simply because it does not have the new notice language. However, any Power of Attorney signed after January 1, 2015 must incorporate the new notice provisions or it will not be honored.

The acknowledgment form that the agent is required to sign was also revised. The former acknowledgement listed specific duties required of the agent. Under the new law, these duties have been

incorporated into the statute and are no longer specifically listed.

The new acknowledgement focuses on the broader requirements that the agent must act in accordance with the principal's reasonable expectations to the extent that the agent actually knows them and, otherwise, must act in the principal's best interest. The acknowledgement also establishes that the agent must act in good faith and only within the scope of authority granted to the agent by the principal under the Power of Attorney. If your agent presents an older Power of Attorney to a financial institution, the agent may be asked to sign the new version of the acknowledgement. Once the new acknowledgement is signed, there is no reason the older Power of Attorney should not be accepted.

In fact, under the new law, financial institutions must accept a pre-2015 Power of Attorney or request an affidavit from the agent affirming that the document is still valid. This request must be issued within seven (7) days of the financial institution's receipt of the Power of Attorney. The ability to request affirmation of the continued validity of a Power of Attorney provides broad protection to banks and financial institutions and third parties who in good faith rely on the Power of Attorney. Financial institutions must have a substantial basis to need any more information regarding the validity of the Power of Attorney.

The new law also limits certain actions by an agent. Under the new law, there are several powers ("hot" powers) that must be expressly granted, and these powers include the ability to:

- Create, amend, revoke or terminate an inter vivos trust;
- Make a gift above or below the federal annual gift exclusion amount (currently, $14,000);
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Delegate authority granted under the power of attorney;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- Exercise fiduciary powers that the principal has authority to delegate; or
- Disclaim property, including a power of appointment.

Prior to 2015, because of the significance of these powers and the impact they could have on one's quality of life and disposition of one's estate, these powers were often discussed with clients during the attorney meeting and the specific powers were either explicitly included or excluded from a Power of Attorney. Accordingly, your older Power of Attorney may already explicitly allow for some or all of these actions to be taken by your agent. If one or more of the above "hot" powers are not in an older Power of Attorney, it may have been unnecessary or unwise at the time. If you believe a specific "hot" power is missing from your current Power of Attorney or was included in error, it is important to discuss the inclusion of the power with an attorney to review the benefits and drawbacks of the specific power and whether a new Power of Attorney may be appropriate.

In summary, the new law made numerous changes to the requirements for a Power of Attorney to be valid and effective. However, the mere passage of a new law does not necessarily mandate the execution of a new Power of Attorney. As a rule of thumb we recommend you review all of your estate planning documents, including your Power of Attorney, at least every five (5) years to makes sure your plan is still adequate for your needs.

This summary is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action. To learn more about Powers of Attorney and estate planning in general, please contact an attorney in our Trust and Estates Practice Group.

Nina B. Stryker, Esq.
(2150 665-3057
nina.stryker@obermayer.com

Paul C. Heintz, Esq.
(215) 665-3212
paul.heintz@obermayer.com

Warren W. Ayres, Esq.
(215) 665-3124
warren.ayres@obermayer.com

Barbara E. Little, Esq.
(215) 665-3257
(856) 857-1402
barbara.little@obermayer.com

Janene B. Reilly, Esq.
(215) 665-3062
janene.reilly@obermayer.com

Obermayer Rebmann Maxwell & Hippel LLP

Centre Square West
1500 Market Street, Suite 3400, Philadelphia, PA 19102-2101
215-665-3000

Woodland Falls Corporate Park
200 Lake Drive East, Suite 110, Cherry Hill, NJ 08002-1171
856-795-3300

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Our satellite office address in West Conshohocken is:
100 Four Falls Corporate Center
1001 Conshohocken State Rd., Suite 313
West Conshohocken, PA 19428
610-825-3634

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