

## Publications

### Ohio's Statutory Form Durable Power Of Attorney

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#### AUTHORED ARTICLE | Fall 2016

Published in the Fall 2016 issue of *The Bankers' Statement*

Financial institutions are particularly susceptible to issues relating to powers and authorizations granted to agents by customers in documents referred to generally as “powers of attorney” (POAs), including the nature of those powers, the extent of those powers, and the duration of those powers. Risk exposure for financial institutions can be high when accepting the agency appointments reflected by POAs, and liability for mistakes and being drawn into disputes between parties where the institution is only tangentially involved as an account holder can be very costly events. In light of those issues, institutions need to know and understand just what type of exposure they are incurring when accepting POAs and transacting on accounts with persons other than the actual account owners and signatories.

Ohio's current version of the Uniform Power of Attorney Act (UPAA) became effective on March 22, 2012, and is set forth in Sections 1337.21 to 1337.64 of the Ohio Revised Code. These sections include a statutory form, a copy of which can be found [here](#), that reflects a “check the box” approach with regard to the powers granted.

For example, the statutory form is “durable” unless it expressly states otherwise (i.e., it will continue in effect if the principal becomes incapacitated). It is also effective immediately unless it provides that it is to become effective at a future date or upon the occurrence of a future event or contingency. The statutory form also permits the use of co-agents, and unless the form provides otherwise, each co-agent may act independently.

The statutory form contains a list of 13 separate powers which the principal may grant to the agent, or the principal may simply grant all 13 listed powers to the agent. These powers are very broad and well defined in the statute, and the intent is that there will be very few occasions when using the statutory form where a financial institution might need to question whether an agent's authority exists to take a specific action. The principal decides which powers to grant to the agent simply by placing his or her initials on the form beside the power

or powers he or she wants to grant. The statutory form also contains a list of powers which cannot be delegated, unless expressly authorized and initialed by the principal.

In light of the likely increased use of the new statutory form, institutions that accept the statutory form from their customers should consider updating their procedures and recordkeeping to accurately record precisely what powers each principal has delegated to his or her agent. Presumably, institutions would require a customer using the statutory form to grant to his or her agent, at a minimum, the powers to deal with "Stocks and Bonds" and "Banks and Other Financial Institutions." Institutions would likely prefer to have the principal delegate all powers by initialing "All Preceding Subjects."

To secure additional protection, institutions may consider requiring the agent to sign an optional form certifying certain facts concerning the power of attorney. A draft of the optional form can be found [here](#). Using the optional form, the agent can be required to certify that the principal is alive and has not revoked the power of attorney, that any event or contingency has in fact occurred if the power of attorney was to become effective only upon the occurrence of an event or contingency, that a prior agent is no longer able or willing to act if any action is to be taken by a successor agent, or any other relevant facts the institution desires. Such a certification is provided under penalty of perjury, and institutions may be able to recover some of the losses from the agent resulting from an invalid power of attorney if any statement in the certification is false. Significantly, however, Ohio's version of the UPAA does not contain the provision in the UPAA drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) which places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney, thereby resulting in some continued risk for the accepting institution.

In addition, Ohio's version of the UPAA does not contain any provision imposing any liability upon an institution for the refusal to accept a power of attorney despite the fact that such a provision does exist in NCCUSL's version of the UPAA.

Problems relating to POAs often arise because many elder law and estate planning lawyers routinely recommend the use of a general power of attorney to their clients in order to avoid the need for establishing a guardianship in the event the principal becomes incompetent. Such planning is frustrated when institutions fail to accept a general power of attorney. A number of professionals have suggested that the Ohio statute should be changed to impose such a liability. Whether that happens remains to be seen. Ohio Revised Code Section 1109.10 provides protection to institutions when receiving POAs or other claims that are "...not clearly consistent with the terms of any applicable authority on file..." to any "...deposit, safe deposit box, property held in safekeeping, security, obligation, or other property in the bank's possession or control, in whole or in part...". That section specifically enables the institution to refuse to recognize the inconsistent claim until it receives direction from a court of appropriate jurisdiction or an adequate bond. It protects institutions, typically caught in disputes between customers and third parties, to refuse to recognize the inconsistent claim until one of those criteria are met before releasing the funds or acting on the inconsistent claim.

As it is likely to be encountered with increasing frequency, institutions should familiarize their personnel with this relatively new statutory form. Many lawyers are using the statutory form because the powers are so well defined by the statutes that there is little risk of a person being able to claim that the agent does not have the authority to act in a specific situation, thereby providing additional protection for institutions relying on the form and the added certifications. In addition, individuals who are doing their own estate

planning based upon documents which exist on the internet will likely be using this new form extensively.

