Legal ALERT
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PHILLIPS NIZER LLP

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CORPORATE & BUSINESS LAW | BANKING & FINANCE ALERT

NEW YORK STATE POWER OF ATTORNEY STATUTE
Impact on Commercial Lenders

On September 1, 2009, new legislation governing powers of attorney became effective in the State of New York. Commercial lenders who are parties to agreements executed in New York State after September 1, 2009, whether or not those agreements are governed by New York law, should consider the impact of this legislation on their agreements. This new legislation can affect powers granted to lenders in security agreements, mortgages, loan documents and other collateral documents. If an individual obligor, whether a borrower or guarantor, appoints a lender as his or her attorney in fact after September 1, 2009, to execute documents, seize collateral, file UCC statements, endorse checks, collect rents, pay insurance premiums, vote pledged stock (including any form of proxy) etc., this appointment will not be valid in New York unless the appointment of the lender complies with the strict requirements imposed by the new law.

It appears that the new legislation applies only to powers of attorney executed by individuals in New York State.

In order for a power of attorney executed by an individual in New York State after September 1, 2009, to be valid under New York law it must:

- be legibly printed or typed in a size no less than twelve-point;
- be signed and dated by both the principal and the agent and the signatures of the principal and each agent must be notarized; and
- contain the exact wording set forth in Section 5-1513 of the New York General Obligations Law relating to "Caution to the Principal" and "Important Information for the Agent."

Lenders must also be aware of the impact of the execution of a valid power of attorney under the new legislation. Under the new law, an individual obligor who validly designates a lender as his agent in a loan agreement, security agreement or other collateral document by complying with the above-mentioned technical requirements, will revoke all of the obligor's prior powers of attorney unless the instrument provides that it does not revoke prior powers of attorney. Such an unintended revocation could have very unfavorable consequences for the obligor. As a result, lenders may wish to include language in these instruments which specifically provides that prior powers of attorney are not revoked.

Similarly, if an individual obligor executes a subsequent power of attorney (for any purpose) it will revoke the valid power of attorney he or she executed in favor of the lender unless the subsequent power of attorney specifically provides that it does not revoke any prior powers of attorney. This revocation could eliminate a right and remedy from the lender's agreements which would otherwise be available to the lender. To address this issue lenders may wish to include language in their instruments to provide that the power conferred upon the lender by the obligor will not be revoked by a future power of attorney executed by the obligor.

(Please see next page for more information.)

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The standard irrevocable power of attorney coupled with an interest language which appears in most lenders' form documents does not provide adequate protection under the new statute. Lenders should consider addressing the possible problems with past and future powers of attorney in their boilerplate power of attorney language. Lenders may want to consider revising the boilerplate language in their existing loan and collateral documents so that the appointment of the lender as attorney in fact complies with the new statute.

Lenders who are entering into forbearance agreements with individual obligors or who are restructuring their loans with defaulting individual obligors may want to require their obligors to execute a power of attorney that contains language which satisfies the new statutory requirements. Such lenders may also want to add language to their loan documents which provides for a covenant by the obligor that he or she shall not execute any subsequent power of attorney unless such power of attorney has language which states that it does not revoke any prior power of attorney made in favor of the lender or take any other action which would revoke the power of attorney granted to the lender. Additionally, lenders may want to add an "Event of Default" based on a breach of that covenant by the obligor.

While it is anticipated that the New York legislature may eventually adopt amendments which will prevent the unintentional revocation of a prior power of attorney, no one knows when or if this will happen. As a result, it is advisable for lenders to modify their agreements to ensure that their rights are protected by making sure that the agreements comply with the requirements imposed by the new legislation.

We are available to provide counsel and guidance concerning powers of attorney, as well as other legal concerns not discussed in this Legal Alert. For additional information on the issues herein and other issues arising under state and federal law, please contact us.

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