

E-ALERT | Mergers & Acquisitions

January 21, 2010

WHITE PAPER ISSUED REGARDING NEW YORK STATUTE AMENDMENTS THAT CALL INTO QUESTION CURRENT PRACTICES FOR PROXY SOLICITATIONS, TENDER OFFERS AND MERGERS

New York adopted amendments to its General Obligations Law in 2009 which imposed extensive new requirements and limitations upon powers of attorney executed by individuals in New York¹. The legislative history of the amendments indicates that they were intended to address the personal estate and financial planning context. Literally read, however, the amendments could be construed to apply as well to powers of attorney signed by individuals in corporate and commercial settings. In the M&A context, for example, the amendments create uncertainty regarding voting proxies, including those embedded in voting agreements. The amendments also raise questions as to stock transfer powers embedded in letters of transmittal utilized in tender offers and mergers or as used in secondary market transactions involving certificated securities. If the amendments were applied literally to any of these instruments, the instruments could not be made irrevocable and, in order to be valid, would need to comply with burdensome and incongruous formal requirements such as required notarizations, manual signature (including for certain types of electronic proxies that do not require signature) and verbatim inclusion of lengthy legends.

Covington & Burling LLP participated with other major law firms in preparing a White Paper which addresses interpretive issues under the New York amendments as they relate to voting proxies and stock transfer powers, for both New York and non-New York corporations, and certain powers of attorney related to the internal governance of non-New York limited liability companies and limited partnerships. The White Paper (see link: [New York Power of Attorney Law White Paper](#)) is intended "to provide a blueprint for a consensus among practitioners" on the limited topics addressed. The analysis in the White Paper supports the conclusion that the New York amendments should not, in general, be interpreted to change the law on these specific topics.² Further, the White Paper raises, for consideration, sample language for inclusion in proxies or proxy statements, stock transfer powers and certain powers of attorney relating to non-New York LLC's and LP's.

Each situation will need to be evaluated based on its particular circumstances, and the White Paper is not intended as legal advice. Recognizing that there is limited legislative history and a lack of official guidance, some uncertainty is likely to remain on the issues addressed, unless and until the questions are resolved by legislative action or court interpretations. Efforts are in process to amend

¹ The amendments are set forth in the New York General Obligations Law §§ 5-1501 *et seq.* and took effect on September 1, 2009.

² Some of the arguments advanced in the White Paper might also be applicable for other types of powers of attorney which the White Paper does not consider.

the statute to clarify the scope of the 2009 amendments in various respects. In the meantime, the White Paper can be expected to provide a helpful tool in the development of rational industry practices.

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