Independent Bankers Association of Texas

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Compliance Overview

Powers of Attorney

By Karen Neeley, IBAT General Counsel, Kennedy Sutherland LLP

Types of powers of attorney

A **power of attorney** designates another person as agent, is signed by an adult principal, and covers either all or limited aspects of the principal's personal and financial affairs.

A **durable power of attorney** is a power of attorney that is signed by an adult (principal) or by another adult in the principal's presence and at their direction; acknowledged (notarized); and specifically states that it either (1) is not affected by the principal's disability or incapacity; (2) becomes effective upon the principal's disability or incapacity. A **statutory durable power of attorney** uses the language prescribed by the form found at Texas Estates Code §752.051. See attached form.

A **springing durable power of attorney** is a durable power of attorney that is not effective unless and until the principal is mentally disabled or incapacitated. Disability or incapacity must be certified in writing by a physician, unless the power of attorney contains a different definition.

A springing statutory durable power of attorney will have line (A) crossed out:

> CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:
>
> ~~(A) This power of attorney is not affected by my subsequent disability or incapacity~~.
>
> (B) This power of attorney becomes effective upon my disability or incapacity.

If neither is crossed out, it will be assumed that the principal selected (A).

When does a power of attorney terminate?

Durable power of attorney or **statutory durable power of attorney** is effective until death or revocation.

Power of attorney (that isn't a durable power of attorney) is effective upon execution and until disability or incapacity, death, revocation or termination event or date specified in the document.

Springing durable power of attorney is effective upon physician's certification of disability or incapacity, and it continues effective until death or revocation.

What powers does an agent have?

The principal grants powers to an agent. Under prior law, the agent was called the "attorney in fact." A principal executing a statutory durable power of attorney form must initial every power he is granting. Any power not initialed isn't granted. Make sure this line is initialed: "Banking and other financial institution transactions." These powers include transactions on accounts, loans, safe deposit boxes, investments, etc. For the statutory durable power of attorney, the law itself provides additional clarification as to the powers. Occasionally you may see a limited power of attorney, which only grants the specific powers listed.

***Note**: Statutory durable powers of attorney executed from January 1, 1998 to December 31, 2013 granted powers by **not** crossing them out. From January 1, 1993 to December 31, 1997, principals granted powers by initialing each power granted.*

Real property transactions

Public record: A power of attorney used for a real property transaction must be recorded in the Real Property records of every county where the principal owns real property on which the agent wants to perform a transaction.

Home equity loans: Because to close a home equity loan with a power of attorney, the power of attorney must be executed at an office of the lender, an attorney at law, or title company, many title companies will not accept them. Confirm acceptance with your title company. Confirm that your secondary market investor will buy a home equity loan closed with a power of attorney. Many will not. The 2017 version of the law specifically states that the power to mortgage and encumber real property includes the power to execute home equity documents.

Safe deposit boxes

An agent with banking powers can access a principal's safe deposit box. For maximum protection of the bank, do not allow an agent to enter a safe deposit box with multiple renters, unless all renters sign something giving him that authority.

POD beneficiary/joint account

An agent with banking powers may open an account for the principal and name a POD beneficiary or change rights of survivorship if such power is specifically authorized in the POA. This is clearly authorized in the 2017 amendments. Also, if the agent is a relative or spouse AND the POA authorizes him or her to name a POD beneficiary, the agent may name him/herself. Also, the agent may open an account that continues the same POD beneficiaries. In addition, such power was previously authorized in Section 113.152 Texas Estates Code for PODs.

Acceptance of POAs

In several different legislative sessions, the Real Estate, Probate, and Trust Law section of the State Bar has tried to amend the Estates Code to mandate acceptance of durable POAs within certain parameters. Effective September 1, 2017, the durable power of attorney law (chapters 751 and 752 of the Texas Estates Code) are amended to mandate acceptance, with certain options available to the business entity that is presented with the POA. The following FAQs address common issues.

***Q** If I am presented with a document that purports to be a durable power of attorney ("POA"), what steps should I take?*

A New Customer. First issue is whether or not the principal already has an account with the bank. You are not required to (but may) engage in a transaction with a new customer. You are not required to expand an existing relationship or provide a product or service that the bank doesn't offer.

Existing Customer. Assuming that the principal already has an account and the agent wants to be added to the account as signatory, first make sure that the document is signed and notarized. It does not need to be recorded to be valid.

***Q** May I require the parties to sign the bank's POA form or to record their POA?*

A No to both. And, often the principal is no longer capable (competent) to sign a new POA. That is one of the reasons that mandatory acceptance is so critical.

***Q** So how do I protect the bank?*

A You may ask the agent to provide an "opinion of counsel" from his attorney at the agent's expense. But you absolutely should require the agent to provide a Certification. There is a statutory form for this. See attached form.

Request the opinion and certification not later than the tenth business day after the date the POA is presented. Finally, if the POA is not in English, you should require an English translation. This must be done not later than the fifth business day after presentment.

Although not in the statute, it would be prudent to have a clear procedure that requires date stamping the POA for the day presented. Use a standard written form to request the opinion, certification, or translation in order to prove that these were requested and that the request was made within the time established by the law.

Q *What are my grounds for refusing acceptance?*

A First, if the agent refuses or can't provide the requested opinion, certification or translation, you could reject the POA. Also, if after reviewing these, the bank believes in good faith that the POA is not valid or the agent doesn't have the authority to act as attempted (e.g. POD beneficiary request but that is not in the POA explicitly), you could reject the POA. You can also reject if the performance of the requested act would violate the terms of the bank's governing docs or an agreement affecting how your business is conducted.

Q *What if I just don't like or trust this agent? When can I refuse to do business with him/her?*

A Here are other circumstances that justify such refusal:

- The bank's engaging in the transaction with the agent or principal would be inconsistent with another state or federal law or regulation, a request from law enforcement or a policy adopted by the bank in good faith that is necessary to comply with another state or federal law, rule or guidance or executive order applicable to the bank.

- The bank wouldn't engage in a similar transaction with the agent because the bank or an affiliate:
  1. Has filed a SAR
  2. Believes in good faith that the principal or agent has a prior criminal history involving financial crimes or
  3. Has had a previous unsatisfactory business relationship resulting in material loss, financial mismanagement or litigation or multiple nuisance lawsuits filed by the agent.

- Bank has actual knowledge of termination of the agent's authority or POA.

- The person commenced or has actual knowledge that another person has commenced a judicial proceeding to construe the POA or review the agent's conduct and that proceeding is pending or final.

- The bank makes, has made or has actual knowledge that someone else has made a report to law enforcement or Adult Protective Services (APS) relating to abuse of the principal.

- The bank receives conflicting instructions from co-agents—but this applies as to the matter in conflict.

Q *Okay, we have a reason to reject. What do we do next?*

A The bank must provide the agent with a written statement advising the agent of the reason or reasons for rejection. However, if the reason relates to a SAR, law enforcement request, or policy necessary to comply with state or federal law, the bank needs to indicate that the reason for the refusal is one described by Section 751.206(2) or (3) in a written statement made under penalties of perjury. No further explanation is necessary. In short, you don't need to violate the confidentiality of SARs or grand jury issues!

Q *What is the timing for the written statement?*

A It is the same as the date for acceptance.

Q ***So, what is the acceptance date?***

A It is not later than the seventh business day after the bank receives a requested certification, not later than the seventh business day after it receives an opinion of counsel, or the date that it receives an English translation.

Q ***If we accept the POA, do we become liable if the agent misbehaves?***

A NO! The law does not shift liability to those who accept a POA. In fact, it provides new liability protection to those who accept a POA without knowledge that it was invalid.

Q ***Can an agent authorize someone else to exercise powers that are granted to him?***

A Yes, if the POA specifically grants this power. This is new.

- **The following was shared by IBAT friend Don Totusek, Partner with Francis & Totusek LLP (Don.Totusek@ftllplaw.com).**
- A 'power of substitution' provision is not in the statutory form and must be specifically granted by the principal in the POA. Below in *italics* is one example of a 'Substitution by Agent' clause.
- *Substitution by Agent. My Agent shall have the power, exercised by acknowledged written instrument, to substitute one or more agents or attorneys-in-fact under my Agent, with power to exercise all or any part of the powers and enjoy the protections granted to my Agent under this instrument, and the power, at the discretion of my Agent, to revoke each such substitution. My Agent may provide for compensation for such substitute agents, whether or not compensation is provided for my Agent hereunder.*
- The requirement that it be 'specifically granted' should reduce the likelihood that it will be frequently used.
- If a bank client asked me about a person who claimed to be the agent because he or she had been appointed by the agent under the original POA, I would advise the bank that it should be treated just as if the bank had been presented with a new POA for the principal (or that it had been presented for the first time), and that the bank should go through the same steps as if it had not seen the instrument before. I would want the substitute agent to provide copies of the original POA and documentation of the appointment of the substituted agent. Since the initial appointment of the agent in the POA had to be in writing and acknowledged, the appointment of the substituted agent must be in writing and acknowledged. (This is known as the "equal dignity rule.") I would require the substituted agent to sign a new certification of facts, and I would consider whether an opinion of legal counsel should be required, depending on the language in the documents.

Q ***What about a POA from another state? Does this law apply, and we must accept?***

A No, this applies to Texas POAs. POAs from other states are valid if they comply with the law of that state or the requirements for a military POA.

Q ***Does the bank need the original POA?***

A No, a photocopy or electronically transmitted copy of an original POA can be relied on to the same extent as an original.

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Compliance FAQs

POA: Webinar Q&As

QUESTION: Does a principal have to see an attorney in order to create a POA? I don't think so but wanted to clarify.

ANSWER: No, creating the POA does not required the use an attorney. The form is published online as part of the Estates Code.

QUESTION: Does the POA presented have to be a durable POA for the mandatory acceptance requirements to apply?

ANSWER: Yes, it must be a durable POA. Below is an email exchange with IBAT friend Don Totusek, Partner with Francis & Totusek, LLP.

> *I agree entirely with your assessment. The Texas Durable Power of Attorney applies only to durable powers of attorney as defined in the Act. Not only the portion you cited, but many, many sections indicate that they are applicable to a durable power of attorney.*
>
> *Of course, the provisions of the statute requiring reasonable acceptance apply only to durable powers of attorney. If the POA is not a DPOA, then there is no statutory requirement that a person reasonable accept the POA.*
>
> *In order to trigger the exception list, a POA must be a DPOA. So if the POA is not a DPOA, then there is no requirement that the bank identify the reason for refusing to accept the POA, and that ground for refusal is not in the statute. But I've included "not a durable power of attorney" in the exception list I would recommend to a bank as a list of grounds for refusal.*

QUESTION: Can the Agent name himself as the POD beneficiary?

ANSWER: It depends. An agent with banking powers may open an account for the principal and name a POD beneficiary or change rights of survivorship if such power is specifically authorized in the POA. This is clearly authorized in the 2017 amendments. Also, if the agent is an ancestor or descendant or spouse AND the POA authorizes him or her to name a POD beneficiary, the agent may name him/herself. Further, the agent may open an account that continues the same POD beneficiaries. Finally, such power was previously authorized in Section 113.152 Texas Estates Code for PODs.

QUESTION: Can the agent close the account and open an account in their name only?

ANSWER: Close and open account, yes: Legal Ease; However, ALWAYS title account: "Principal by agent". The account should never be just in the name of the agent.

QUESTION: Must the POA be recorded with the county clerk's office?

ANSWER: No, for basic banking use. If the POA will be used for Real Estate transactions, then the POA will need to be recorded at that time.

QUESTION: How old may a POA be?

ANSWER: There are no time restrictions unless there is a term in the doc itself. If the POA is dated 1+ year(s), we recommend that you have a policy to require the Certification to be completed. One of the questions in the Certification is whether the POA has been revoked. Revocation or termination are the only ways that an authority of the Agent is removed.

QUESTION: Is opinion of counsel same as certification form?

ANSWER: No. The certification form is completed by the agent while the opinion of counsel is completed by the agent's attorney.

QUESTION: For the agent to be able to appoint another agent, it would have to be specified in the original POA that the agent has the authority to appoint another agent?

ANSWER: Yes, a current, active Agent will have the authority designated in the document. The new standard language is: "Authorize another person to exercise the authority granted under this power of attorney "and it must be initialed. The POA will most likely not list a specific, delegated person's name. If POA is drafted by an attorney, you may see a little different language.

QUESTION: Since law enforcement requests and SAR's are not public knowledge to our staff, does this mean that our BSA department must review all DPOA's?

ANSWER: Not a requirement in the statute. This should be considered as part of your policy/procedures. Best Practice recommendation: request a review of the POA by the BSA office to get their stamp of approval; however, they should just stamp as 'approved' or 'reject for statutory reason' (never define BSA reason).

QUESTION:
Why does POA not ask for DOB or SS# to help identify principal? Some customers have very common names and address may not match our records as they moved to stay with family or nursing home?

ANSWER: Agree this is an issue… not a topic resolved in the statute. We recommend this should be addressed in your policy/procedures. Best practice recommendation/suggestion: require a separate document (apart from the POA form, since the POA could be recorded for public record) that provides identification of the agent and the principal that can be verified.

QUESTION:
If the agent grants powers to a substitute, should the bank have something in writing specifying who?

ANSWER: Yes, there should be a separate Certification for each agent. There is no statutory form. Best Practice recommendation would be some sort of documentation (such as: "I, ____(agent), do hereby give…"), identification process, and Certification by the agent. You may also request an Opinion of Counsel.

QUESTION: Why is page 5 of the statutory form after the notarization page? It appears it's not part of the form itself. To me someone (agent) could just initial for the principal and we wouldn't know. Is this just not our problem? If we get it, we just accept it...

ANSWER: The first 4 pages are the standard language. Page 5 is really optional choices that are commonly selected by the principal. These additional powers should be inserted before the signature and notarization.

QUESTION: Is it acceptable to require an "opinion of counsel" each time the Bank is presented with a new POA, thus making it part of the standard procedure?

ANSWER: Yes, you can but Best practice recommendation: get a new Certification for every new procedure, (i.e. new account, new loan, etc.). This will ensure that the POA has not been changed or revoked. Opinion of Counsel can be expensive and time consuming and probably should only be required the first time the POA is offered.

QUESTION: If the agent appoints a substitute agent, are they able to revoke the substitute agent's authority?

ANSWER: This is not spelled out in the statute. However, logically the original agent should retain the power to revoke the substitute agent's authority. Require a written revocation and new certification!

QUESTION: Does the bank need to keep record (copy) of the denial notice and do we need to keep record (copy) of the adherence to the time frames?

ANSWER: Not required under the statute. However, as 'best practice', we recommend keeping an electronic copy of the Rejection notice, along with any corresponding documentation (such as your request for certification). Your policies and Procedures should clearly establish the time frames, and you should be able to argue that you train on this and always follow them. That would provide a defense.

QUESTION: Does the Bank have to accept an out of state POA?

ANSWER: No. Recommend as Best Practice: give the letter of rejection notice with the reason (i.e. I could not verify the validity). If you accept the out of state POA, we recommend that you get a certification from the agent and an Opinion of counsel.

QUESTION: Do we have a right to require that the agent complete a signature card in order for their information and signature to be on file or must we accept a POA just have a copy of it on file.

ANSWER: Not specified in the statute. Update the signature card would be 'best practice'. Clearly label as "POA" account. Remember that the principal may not be incapacitated. In that event, you still need a new card but with both the Principal and agent as signatories.

QUESTION: When a principal signs with an X, can the bank reject?

ANSWER: People can define their own signatures. Remember this document has to be verified by the Notary (who is required to verify identity of the signer).

QUESTION: To close an account, could you make the check payable to the agent only.

ANSWER: Agent can close account and withdraw all the money. BUT the check should clearly be to John Doe, Agent for Principal.

QUESTION: Would it be in the bank's discretion to ask that an agent seek an attorney opinion if we have a divorce decree that is dated before the POA that states the agent does not have rights to the account?

ANSWER: Too complicated; you will need to seek your attorney to work through the weeds on this one. But you definitely should ask for an Opinion of Counsel!