



August 11, 2017

8584 Katy Freeway, Suite 420

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

Partners

Thomas E. Black, Jr.¹

Gregory S. Graham²

Shawn P. Black³

Regina M. Uhl⁴ ‡

Senior Lawyers

David F. Dulock

Diane M. Gleason

Associates

Peter B. Idziak³

Daniel S. Engle³

Nick Stevens

Sydney Davis

Of Counsel

David M. Tritter

Calvin C. Mann, Jr.

Retired Partner(s)

Calvin C. Mann, Jr.

¹ Also Licensed in Iowa, New York, and Washington

² Also Licensed in Georgia

³ Also Licensed in New York

⁴ Also Licensed in Kentucky and Illinois

‡ Board Certified- Residential Real Estate Law- Texas Board of Legal Specialization

To: Clients and Friends

From: David F. Dulock

Subject: Lender Responsibility under New Durable Power of Attorney Law

On July 13, 2017 (revised July 24, 2017), we posted on the firm's website Legislative Update II summarizing the new requirements enacted into law by House Bill 1974 ([click here](#)) and Senate Bills 39 and 1193 ([click here and here](#)), which are effective September 1, 2017, that substantially affect durable powers of attorney under Chapters 751 and 752 of the Estates Code. If you have not read Legislative Update II, we advise that you do so before September 1, 2017, because it details important new requirements regarding the acceptance of or refusal to accept durable powers of attorney.

In addition to Legislative Update II, this follow-up memorandum provides specific guidance to mortgage lenders and originators (herein "mortgage lender") using durable powers of attorney in the origination of residential mortgage loans. The following apply to a mortgage lender presented with and asked to accept a durable power of attorney by the principal or the agent authorized to act under the power of attorney.

Time Period to Accept or Reject Durable Power of Attorney

- A mortgage lender has 10 business days to accept or reject a durable power of attorney presented for acceptance by either the principal or the agent unless this period is extended as described below.
- To extend this 10-business day period, a mortgage lender may request the agent's certification regarding the validity of, and the agent's authority under, the durable power of attorney not later than the 10th business day. On receipt of the agent's certification, the mortgage lender is required to accept or reject the durable power of attorney not later than the seventh business day after receipt. We advise that an agent's certification always be requested because an agent's certification may be conclusively relied on by the mortgage lender. (*See Attachment 1 to Legislative Update II for the text of the agent's certification form.*)
- To extend this 10-business day period for a non-English durable power of attorney, not later than the fifth business day after the date the durable power of attorney is presented for acceptance an English translation may be requested. In which case, the durable power of attorney is not considered presented for acceptance until the date the mortgage lender receives the translation. In this instance, we advise not requesting an agent's certification until after receipt of the English translation in order to extend the period allowed to accept or reject the power of attorney.
- Additionally, the principal or agent presenting a durable power of attorney for acceptance and the mortgage lender may agree to extend a time period prescribed above. No format for the agreement or time period during which the agreement may be entered into is specified but we advise that the agreement be in writing, dated and signed by both parties before the end of the original 10-business day period.

(3 pages)

Computing Business Days

Business day is not defined in the Estates Code and §21,002(a) thereof provides that Chapter 311, Government Code, applies to the construction of a provision in the Estates Code, except for Estate Code Sections not applicable to durable powers of attorney. Therefore, in computing business days for accepting or rejecting a durable power of attorney, exclude the first day and include the last day, and if the last day is a Saturday, Sunday, or legal holiday, extend the period to include the next day that is not a Saturday, Sunday, or legal holiday (§311.014 (Computation of Time) Government Code).

Unintentional Acceptance of a Durable Power of Attorney

A durable power of attorney is considered accepted on the first day the mortgage lender agrees to act at the agent's direction under the power of attorney. Therefore, we advise mortgage lenders to implement procedures that will avoid an unintentional acceptance of the power of attorney before a decision has been made to accept or reject it.

Grounds for Refusing to Accept a Durable Power Of Attorney

The grounds for refusing to accept a durable power of attorney are limited to those listed in new Section 751.206 of the Estates Code. (*See the Exhibit attached to this memorandum for the complete list of these grounds.*) The refusal must be in a written statement advising the agent of the reason(s) for the refusal and must be provided to the agent on or before the date the mortgage lender is otherwise required to accept the durable power of attorney.

Civil Liability

Failure to timely or properly accept or reject a durable power of attorney may subject a mortgage lender to civil liability for attorney's fees, court costs and an order to accept the power of attorney.

Photocopy or Electronically Transmitted Copy of a Durable Power of Attorney

Except as otherwise provided by statute other than the Durable Power of Attorney Act in Chapters 751 and 752 of the Estates Code or by the durable power of attorney, a photocopy or electronically transmitted copy of an original durable power of attorney has the same effect as the original instrument and may be relied on, without liability, by a mortgage lender who is asked to accept the durable power of attorney to the same extent as the original.

Review of Power of Attorney by Black, Mann and Graham

For this firm to review a durable power of attorney for a client that requests a review, the following requirements must be met:

- We must receive a complete and legible copy of the power of attorney and supporting documentation necessary to review it within the required period for acceptance or rejection noted above.

- If we provide you with a conditional acceptance, you must confirm satisfaction of the condition(s) or, if not satisfied, reject the power of attorney before the end of the required period for acceptance or rejection noted above.
- If we reject a power of attorney, it is your responsibility to timely and properly send the agent the written statement of refusal as noted above.
- We will not be responsible for rejecting a power of attorney based on any ground for refusal within your knowledge and not timely communicated to us in writing.

No attempt was made by this memorandum to address all the requirements of these bills that could affect mortgage lending or mortgage lenders. This memorandum is simply an attempt to provide our clients with some guidance on accepting and refusing to accept a durable power of attorney. You are advised to review the entirety of these bills for more information. You may request copies of these bills from us or you may click on the hyperlink to each bill.

Exhibit – GROUNDS FOR REFUSAL TO ACCEPT DURABLE POWER OF ATTORNEY

This Memorandum is provided as general information in regard to the subject matter covered, but no representations or warranty of the accuracy or reliability of the content of this information are made or implied. Opinions expressed in this memorandum are those of the author alone. In publishing this information, neither the author nor the law firm of Black, Mann & Graham L.L.P. is engaged in rendering legal services. While this information concerns legal and regulatory matters, it is not legal advice and its use creates no attorney-client relationship or any other basis for reliance on the information. Readers should not place reliance on this information alone, but should seek independent legal advice regarding the law applicable to matters of interest or concern to them. The law firm of Black, Mann & Graham L.L.P. expressly disclaims any obligation to keep the content of this information current or free of errors.

EXHIBIT

GROUND S FOR REFUSAL TO ACCEPT DURABLE POWER OF ATTORNEY

Section 751.206 lists the following reasons a person is not required to accept a durable power of attorney:

(1) the person would not otherwise be required to engage in a transaction with the principal under the same circumstances, including a circumstance in which the agent seeks to:

(A) establish a customer relationship with the person under the power of attorney when the principal is not already a customer of the person or expand an existing customer relationship with the person under the power of attorney; or

(B) acquire a product or service under the power of attorney that the person does not offer;

(2) the person's engaging in the transaction with the agent or with the principal under the same circumstances would be inconsistent with:

(A) another law of this state or a federal statute, rule, or regulation;

(B) a request from a law enforcement agency; or

(C) a policy adopted by the person in good faith that is necessary to comply with another law of this state or a federal statute, rule, regulation, regulatory directive, guidance, or executive order applicable to the person;

(3) the person would not engage in a similar transaction with the agent because the person or an affiliate of the person:

(A) has filed a suspicious activity report as described by 31 U.S.C. Section 5318(g) with respect to the principal or agent;

(B) believes in good faith that the principal or agent has a prior criminal history involving financial crimes; or

(C) has had a previous, unsatisfactory business relationship with the agent due to or resulting in:

(i) material loss to the person;

(ii) financial mismanagement by the agent;

(iii) litigation between the person and the agent alleging substantial damages; or

(iv) multiple nuisance lawsuits filed by the agent;

(4) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before an agent's exercise of authority under the power of attorney;

(5) the agent refuses to comply with a request for a certification, opinion of counsel, or translation under Section 751.201 or, if the agent complies with one or more of those requests, the requestor in good faith is unable to determine the validity of the power of attorney or the agent's authority to act under the power of attorney because the certification, opinion, or translation is incorrect, incomplete, unclear, limited, qualified, or otherwise deficient in a manner that makes the certification, opinion, or translation ineffective for its intended purpose, as determined in good faith by the requestor;

(6) regardless of whether an agent's certification, opinion of counsel, or translation has been requested or received by the person under this subchapter, the person believes in good faith that:

(A) the power of attorney is not valid;
(B) the agent does not have the authority to act as attempted; or
(C) the performance of the requested act would violate the terms of:
 (i) a business entity's governing documents; or
 (ii) an agreement affecting a business entity, including how the entity's business is conducted;

(7) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding to construe the power of attorney or review the agent's conduct and that proceeding is pending;

(8) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding for which a final determination was made that found:

(A) the power of attorney invalid with respect to a purpose for which the power of attorney is being presented for acceptance; or

(B) the agent lacked the authority to act in the same manner in which the agent is attempting to act under the power of attorney;

(9) the person makes, has made, or has actual knowledge that another person has made a report to a law enforcement agency or other federal or state agency, including the Department of Family and Protective Services, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent;

(10) the person receives conflicting instructions or communications with regard to a matter from co-agents acting under the same power of attorney or from agents acting under different powers of attorney signed by the same principal or another adult acting for the principal as authorized by Section 751.0021, provided that the person may refuse to accept the power of attorney only with respect to that matter; or

(11) the person is not required to accept the durable power of attorney by the law of the jurisdiction that applies in determining the power of attorney's meaning and effect, or the powers conferred under the durable power of attorney that the agent is attempting to exercise are not included within the scope of activities to which the law of that jurisdiction applies.

Our Comment: Regarding reason (3)(A) above, Federal law requires a suspicious activity report (SAR) to be kept confidential and prohibits disclosure of a SAR or any information revealing a SAR's existence (see 31 U.S.C. Section 5318(g)(2)(A) and 31 CFR Section 103.18(e). Just making reference to reason (3) in the written statement, when the reason is filing a SAR under 3(A), may violate Federal law because it could be construed as information revealing a SAR's existence. In our view, this makes using reason 3 in this instance problematic.