



**WINSTEAD**

# Legislative Update: New Vulnerable Persons and POA Statutes

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# Introduction

\*The Texas Legislature has passed several new statutes that impact fiduciaries, financial institutions, investment advisors, and broker dealers.

\*There are new statutory changes that require persons to accept durable power of attorney documents (“DPOA”) and otherwise broadens agents’ powers.

\*There are also new statutes that require financial institutions, investment advisors, and broker dealers to report incidences of financial exploitation of vulnerable persons.

\*In fact, these statutory changes relate to one another and cross reference the other.

# Exploitation Statute: Introduction

- The Texas Legislature now requires employees to report suspected incidences of financial exploitation to their employers, and for the financial institution, securities dealers, or financial adviser to similarly make reports to the Texas Department of Family and Protective Services (the “Department”).
- “H.B. 3921 seeks to protect the financial well-being of these individuals by authorizing financial institutions, securities dealers, and investment advisers to place a hold on suspicious transactions involving these vulnerable adults and by requiring the reporting of suspected financial exploitation.”
- This Legislation took effect September 1, 2017.

# Exploitation Statute: Definitions

- A “vulnerable adult” means someone who is sixty-five (65) years or older or a person with a disability.
- The term “exploitation” means: “the act of forcing, compelling, or exerting undue influence over a person causing the person to act in a way that is inconsistent with the person’s relevant past behavior or causing the person to perform services for the benefit of another person.”

# Exploitation Statute: Definitions

- “Financial exploitation” means:
- (A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person’s money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.

# Exploitation Statute: Employee Reporting Obligation

- If an employee has cause to believe that financial exploitation of a vulnerable adult who is an account holder has occurred, is occurring, or has been attempted, the employee shall notify the employer of the suspected financial exploitation.
- From a practical perspective, this requires employers to educate and train employees about financial exploitation so that they know when to suspect that is occurring.



# Exploitation Statute: Employee Reporting Obligation

- Who is an account holder?
- The statute does not define “account” or “account holder.” Texas Estates Code section 113.001 provides that “account” means “a contract of deposit of funds between the depositor and a financial institution. The term includes a checking account, savings account, certificate of deposit, share account, *or other similar arrangement.*” Tex. Est. Code § 113.001(1) (emphasis added).
- The vague term: “or other similar arrangement” does not provide a lot of limitation on what is meant by “account.”
- Section 113.004 describes multiple types of accounts, including convenience accounts, joint accounts, multi-party accounts, POD accounts, and trust accounts.
- Retirement accounts are in Estates Code Section 111.051.

# Exploitation Statute: Employer Reporting Obligation

- If an employee makes such a report or the employer otherwise has cause to believe a reportable event has occurred, then the employer shall (1) assess the suspected financial exploitation and (2) submit a report to the Department.
- The employer should submit the report not later than the earlier of: (1) the date it completes an assessment; or (2) the fifth business day after the date the employer is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted.
- May also report to a disinterested third party reasonably associated with the vulnerable person.

# Exploitation Statute: Holds

- If an employer submits a report, it (1) may place a hold on any transaction that: (A) involves an account of the vulnerable adult; and (B) the employer has cause to believe is related to the suspected financial exploitation; and (2) must place a hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Department or a law enforcement agency.
- This hold generally expires ten business days after the report was submitted and the employer may extend a hold for an additional thirty business days “if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation.” *Id.*
- The employer may also petition a court to extend a hold.

# Exploitation Statute: Policies

- The statute requires that an employer adopt internal policies, programs, plans, or procedures for: (1) the employees to make the notification; and (2) the employer to conduct the assessment and submit the report.
- A employer shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction.

# Exploitation Statute: Immunity

- An employee or employer who makes a report to the Department or to a third party is immune from any civil or criminal liability unless they acted in bad faith or with a malicious purpose.
- An employer that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from any civil or criminal liability or disciplinary action resulting from that action or inaction.

# Exploitation Statute: Records

- A financial institution shall provide access to or copies of records relevant to the suspected financial exploitation to the Department, law enforcement, or a prosecuting attorney.
- The provisions in Texas Finance Code Section 59.006 relating to notice and reimbursement for customer records do not apply to these provisions.

# Exploitation Statute: Related Issues

- The statutory definition of “financial exploitation” seems very broad.
- Employers should be aware of another provision that dictates when a financial institution has notice of a breach of fiduciary duty: Texas Business and Commerce Code Section 3.307.
- Section 3.307 sets forth the rules dictating when a taker of an instrument would lose its holder-in-due-course status due to having notice of fiduciary breaches.

# Exploitation Statute: Related Issues

- When an exploiter takes advantage of a vulnerable person, the exploiter often does not make wise investments with the wrongfully obtained assets, and may be judgment proof later.
- Accordingly, plaintiffs often look to others who have deeper pockets and may be able to pay a judgment.
- There are several theories in Texas that allow a plaintiff to sue a third party for the exploiter's bad conduct: aiding and abetting breach of fiduciary duty, knowing participation in breach of fiduciary duty, and conspiracy.
- These claims are "hot topics" right now and the new statute may assist plaintiffs in the use of these liability-broadening claims.



# DPOA Statute: Introduction

- Historically, in Texas, financial institutions and others did not have to accept a power of attorney document.
- Involvement by Real Estate, Probate, and Trust Law (REPTL) Section of the State Bar of Texas to effectuate changes.
- One aspect of the new statutory provisions is to make sure that financial institutions and others accept power of attorney documents.
- The provisions also potentially allow broad additional powers to designated agents; powers that would even allow the agents to benefit themselves from the principal's assets.

# DPOA Statute: Application

- This statute applies to DPOAs as defined in the statute.
- To be a durable power of attorney, it must be in a writing or other record that designates a person as an agent and grants authority to act in place of the principal, signed by the principal or another at the principal's direction, be acknowledged, and contain words that: 1) the power of attorney document is not affected by the subsequent disability or incapacity of the principal, 2) the power of attorney becomes effective on the disability or incapacity of the principal, or 3) other similar words that clearly indicate that the authority conferred on the agent shall be exercised notwithstanding the principal's subsequent disability or incapacity.
- Does not have to be signed by a principal in all circumstances.

## DPOA Statute: Agent

- A person accepts the appointment simply by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance of the appointment.
- Unless a DPOA provides otherwise, an agent is entitled to the reimbursement of reasonable expenses and compensation that is reasonable under the circumstances.

# DPOA Statute: Duty To Accept

- A person who is presented with and asked to accept a durable power of attorney by an agent shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification or an opinion of counsel not later than the 10th business day after the date the power of attorney is presented; or (B) request an English translation not later than the fifth business day after the date the power of attorney is presented.
- A person who requests an agent's certification or an opinion of counsel must accept the DPOA not later than the seventh business day after the date the person receives the requested certification or opinion.
- These periods can be extended by agreement.

## DPOA Statute: Deadlines

- The statute does not describe “business days.”
- Under the Texas Government Code, in computing business days, a person should exclude the first day and include the last day, and if the last day is a Saturday, Sunday, or legal holiday, the person should extend the period to include the day that is not a Saturday, Sunday, or legal holiday.

## DPOA Statute: Restrictions

- A person cannot refuse to accept a DPOA without a reason.
- A person cannot ask for an alternative DPOA.
- A person cannot ask for an original.
- A person cannot require the agent to file the DPOA unless required by law.
- If past the deadline, the person cannot require the agent to provide a certification, opinion of counsel, or English translation.

# DPOA Statute: Presentment

- One issue is when is a DPOA presented so that it starts the clock?
- The event that triggers a person's time period to accept the power of attorney document is the presentment of the document and a request to accept it by an agent.
- This should normally be a fairly easy assessment.

# DPOA Statute: Presentment

- Each request will normally be focused on a particular transaction or request some action by the person.
- However, Section 751.201(a) does not use the term “transaction” or require the request to involve an action by the person; rather it uses a broader phrase: “who is presented with and asked to accept a durable power of attorney by an agent... .”
- If there is no transaction at issue, a person should request to clarify whether the agent wants the person to “accept” the DPOA at this time.
- If so, the person should consider the DPOA “presented” and start the process for accepting or rejecting it.



## DPOA Statute: Agent's Certification

- A person to whom the power of attorney is presented may request that the agent provide an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney.
- The statute provides a form for the certification for parties to use.
- When to request?

# DPOA Statute: Physician's Note

- If the DPOA is springing, the person may request that the certification include a written statement from a physician that states that the principal is presently disabled or incapacitated.
- Same ten day period as the agent's certification.
- Unless otherwise defined in the DPOA, a person is considered disabled or incapacitated if a physician certifies in writing at a date later than the date of the DPOA that, based on the physician's medical examination of the person, the person is determined to be mentally incapable of managing the person's financial affairs.
- HIPPA issues?
- When to request?

## DPOA Statute: Opinion of Counsel

- The person may request from the agent an opinion of counsel regarding any matter of law concerning the power of attorney so long as the person provides to the agent the reason for the request in a writing or other record.
- If timely sought, this opinion will be prepared by the principal or agent, at the principal's expense.
- When to request?

# DPOA Statute: English Translation

- The person may request an English translation from the agent presenting the DPOA if some or all of the DPOA is not written in English.
- If timely requested (within five days of presentment), the translation must be provided by the principal or agent at the principal's expense.
- If the person asks for an English translation, then the DPOA is not considered presented until the date the person receives the translation.
- At that point the person can request a certification, doctor's statement, and/or attorney opinion.
- When to request?

# DOA Statute: Defenses

- The statutes have several different defenses that a person can raise in litigation if the decision to accept the DPOA is ever challenged.
- A person may accept a copy of a DPOA “without liability.”
- A person who in good faith accepts a power of attorney without actual knowledge that the signature of the principal is not genuine may rely on a presumption that the signature is genuine and that the power of attorney was properly executed.

# DPOA Statute: Defenses

- A person who in good faith accepts a power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the power of attorney as if: (1) the power of attorney were genuine, valid, and still in effect; (2) the agent's authority were genuine, valid, and still in effect; and (3) the agent had not exceeded and had properly exercised the authority.
- "A person may rely on, without further investigation or liability to another person, an agent's certification, opinion of counsel, or English translation that is provided to the person under this subchapter."

# DPOA Statute: Defenses

- A person is not considered to have actual knowledge of a fact relating to a power of attorney, principal, or agent if the employee conducting the transaction or activity involving the power of attorney does not have actual knowledge of the fact.
- “Actual knowledge” means the knowledge of a person without that person making any due inquiry and without any imputed knowledge.
- This is a very favorable definition of actual knowledge for financial institutions.

# DPOA Statute: Rejecting DPOA

- A person is not required to accept a power of attorney if: the person would not otherwise be required to enter into a transaction with the principal; the transaction would violate another law or a request from law enforcement; the person filed a SAR regarding the principal or agent or the principal or agent has prior criminal activity; the person has a negative business history with the agent; the person knows that the principal has revoked the agent's authority; the agent refused to provide a certification, opinion, or translation; the person believes in good faith that a certification, opinion, or translation is incorrect or deficient.



# DPOA Statute: Rejecting DPOA

- Further, the person may reject for the following reasons: the person believes in good faith that the agent does not have authority to conduct the transaction; the person has knowledge that a judicial proceeding has been instigated regarding the power of attorney document or has been completed with negative results for the document; the person receives conflicting instructions from co-agents; the person has knowledge that a complaint has been raised to the proper authorities 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; or the law that would apply to the power of attorney document does not require the person to accept the document.

# DPOA Statute: Rejecting DPOA

- If a person refuses to accept a DPOA, then it should provide a written statement setting forth the reason for the refusal.
- However, if the person is refusing the DPOA due to a reason set forth in Section 751.206(2) or (3), then the person shall provide a written statement signed by the person under penalty of perjury stating that the reason for the refusal is a reason described by Section 751.206(2) or (3), and the person is not required to provide any additional explanation.
- Are SAR reports to be kept confidential under federal law?
- This response must be provided to the agent on or before the date the person would otherwise be required to accept the DPOA.

# DPOA Statute: Litigation

- The principal or agent may bring an action against a person who wrongfully refuses to accept a DPOA.
- This suit may not be commenced until after the date the person is required to accept the DPOA.
- The exclusive remedies are that the court shall order the person to accept the DPOA and may award the plaintiff court costs and reasonable and necessary attorney's fees.
- A court may award costs and fees to the person if: (1) the court finds that the action was commenced after the date the written statement was timely provided to the agent; (2) the court expressly finds that the refusal was permitted; or (3) Section 751.212(e) does not apply and the court does not issue an order ordering the person to accept the power of attorney.

## DPOA Statute: Litigation

- A person who is asked to accept a DPOA may bring an action requesting a court to construe or determine the validity or enforceability of the power of attorney.
- This provision does not expressly discuss attorney's fees or court costs.
- The person may potentially assert a request for a declaration regarding the effectiveness of the DPOA, and a statute allows a trial court to potentially award fees for such. Tex. Civ. Prac. & Rem. Code Ann. § 37.009.

# Conclusion

- It is a whole new world for financial institutions, broker/dealer, and financial advisors.
- There are onerous new statutes that create new duties to investigate and report financial exploitation, new obligations to accept DPOAs, and potentially new liabilities.
- The protections are qualified.
- Financial institutions, brokers/dealers, and financial advisors should seek legal advice on training, policies and procedures to limit risk.