

## Changes

Any changes to Power of Attorney (as notified by the granter or attorney), granter or attorney details or mental capacity should be reviewed and recorded appropriately on customer records. This may result in a change in who is able to act on the account or where information is to be sent.

Changes may not be formally notified, conversations or correspondence could provide indicators of change, for example a change in mental capacity indicated by a reference to the granter now being in residential care or having dementia. Where any changes are suspected, they should be verified with the attorney in an appropriate and sensitive manner and recorded appropriately.

Additional care should be taken regarding changes around death, divorce or bankruptcy which may affect the validity of the Power of Attorney.

## Bankruptcy

If an attorney for a Continuing Power of Attorney becomes bankrupt at any point or a protected trust deed is put in place, they will no longer be allowed to act as attorney for property and affairs. People who are bankrupt can still act as an attorney for welfare. Where there are no other attorneys left to act, or only one attorney left to act jointly (with no exceptions), the Power of Attorney will end.

## Death

On the death of a granter, the Power of Attorney automatically ends.

On the death of an attorney, where there are no other attorneys left to act, or only one attorney left to act jointly (with no exceptions), the Power of Attorney will end.

## Divorce

If an attorney is married to or in a civil partnership with the granter and there is a divorce or an annulment they will no longer be allowed to act as an attorney (unless the Power of Attorney says they can). Where there are no other attorneys left to act, or only one attorney left to act jointly (with no exceptions), the Power of Attorney will end.

## More Information

Office of the Public Guardian in Scotland  
<http://www.publicguardian-scotland.gov.uk/>

Adults with Incapacity (Scotland) Act 2000 Code of Practice for Continuing and Welfare Attorneys  
<http://www.gov.scot/Publications/2011/03/24114457/0>

Adults with Incapacity (Scotland) Act 2000 Code of Practice for persons authorised under intervention orders and guardians

<http://www.gov.scot/Publications/2008/03/18094148/0>

## Administration Checklist

The following list is intended to provide a general checklist for administration staff on receipt of a Power of Attorney. Firms may wish to tailor this to reflect their own administration, process and systems requirements.

- Is the document original or certified?
- Continuing Power of Attorney – is it registered?
- Photocopy or scan all pages
- Return the Power of Attorney to the sender
- Does the granter have mental capacity?
- Are there any restrictions (if yes have they been recorded)?
- Are there multiple attorneys (can they act jointly, jointly and severally or a combination and has that been recorded)?
- Do statement and correspondence details need to be changed?
- Do payment details need to be changed?
- Have all anti money laundering / customer due diligence checks been completed for all people with authority to act on the account?
- Have all relevant customer records to indicate the Power of Attorney has been received and who has authority to act on the account?

## Financial Abuse

Where the granter has lost capacity and financial abuse is suspected from an attorney or court appointed guardian or an intervenor, firms should raise this with their own legal department and raise, where relevant, with the investigation team at the Office of the Public Guardian in Scotland who will investigate relevant complaints or concerns.

## About TISA

TISA is a unique industry-wide membership organisation. Our mission is to bring the UK financial services savings industry together to promote collective engagement, to deliver solutions and to champion innovation for the benefit of citizens, our industry and the nation. [www.tisa.uk.com](http://www.tisa.uk.com)

## Disclaimer

*The information is provided free and is current at July 2018. It is intended to provide a summary of Powers of Attorney in Scotland and aid their administration in the financial services industry, based on TISA's understanding of current law and guidance.*

*While every care has been taken to ensure the accuracy of this information, TISA cannot accept any responsibility for any inconvenience, loss, damage, or liability nor for any legal fees and costs incurred or caused as a result of any information provided.*



# Powers of Attorney

## Scotland

## A guide for administration in financial services

## What is a Power of Attorney?

A Power of Attorney is a legal document where one person can give another person(s) the power to act on their behalf.

The administration of Powers of Attorney in financial services firms is often a sensitive area for customers, requiring care and understanding when dealing with their administration.

## What are the different types of Power of Attorney?

*General Power of Attorney*, set up for practical reasons and is only valid while the granter has mental capacity.

*Continuing Power of Attorney*, set up for practical and safeguarding reasons and is valid both while the granter has mental capacity and after the granter has lost mental capacity. Must be registered with the Office of the Public Guardian in Scotland before it can be used.

*Welfare Power of Attorney (not valid for financial services)*, set up for practical and safeguarding reasons and is valid after the granter has lost mental capacity. Must be registered with the Office of the Public Guardian in Scotland before it can be used.

*Guardianship Order*, an order granted by the Sheriff Court to represent someone who has lost mental capacity, usually lasting for 3 years unless stated otherwise in the document. This has broad similarities to a Power of Attorney.

*Intervention Order*, an order granted by the Sheriff Court to represent someone who has lost mental capacity, lasting until the authorised matters under the order are concluded.

## Registered Power of Attorney

When a Power of Attorney is registered with the Office of the Public Guardian in Scotland, every page will be stamped, watermarked as a copy or watermarked to indicate electronic registration. Where electronic registration has occurred, the copy must also be certified.

## Certified Copy

Powers of Attorney have specific certification rules. Every page must contain specific text and be signed and dated only by the granter, a solicitor, a stockbroker or a person authorised for the purposes of the Legal Services Act 2007.

## Restrictions

Within a Power of Attorney is the ability to make restrictions on when it can be used. Most commonly is that a Continuing Power of Attorney can only be used once the granter has lost their mental capacity. Additional restrictions apply in relation to discretionary or managed accounts as without express consent, a Power of Attorney does not provide that authority to enter into new or to continue existing arrangements.

## What is Mental Capacity / Incapacity?

Mental capacity is the ability to make a decision.

In relation to Powers of Attorney, whenever the term 'a person who lacks capacity' is used, it may mean a person who lacks capacity to make or remember a particular decision or to take a particular action for themselves at the time the decision or action needs to be taken. If a person cannot communicate their decision, there are additional considerations under the Adults with Incapacity (Scotland) Act 2000.

For Powers of Attorneys registered from October 2007, if the Power of Attorney is to be used at a later date i.e. in the event of the granter's incapacity, the Power of Attorney must include a statement which shows that the granter has considered how incapacity is to be determined (if unable to act until the granter has lost capacity) and may provide requirements to prove incapacity (e.g. a letter from a GP).

A 'certificate of capacity' is included in the Power of Attorney and must be provided for registration.

## What is a Certificate of Capacity?

This is a certificate in the prescribed form by a practicing - solicitor, member of the Faculty of Advocates or a registered and licensed medical practitioner to certify that they have interviewed the granter immediately before signing, they are satisfied the granter understands the nature and extent and have no reason to believe the granter is acting under undue influence.

## Who is involved in a Power of Attorney?

*Granter*, person who grants the power (the beneficial owner).

*Attorney*, person(s) given the authority to act on behalf of the granter. Up to 4 attorneys are generally appointed, though it is possible to appoint more, plus named substitutes. Where there are multiple attorneys and substitutes it will be specified in the Power of Attorney if they are to act jointly (all must agree to each decision) or jointly and severally (may act together or individually). It is also possible to appoint attorneys to act jointly in some matters but jointly and severally in others.

## What should I do on receipt of a Power of Attorney?

- Check the document is an original or a certified copy.
- Photocopy or scan all documents and return to the sender immediately, this allows a copy to remain on file while ensuring the customer has their copy returned in good time. Duplicate and certified copies can be costly and often the document will need to be submitted to many firms.

- Check the attorney(s) has/have been given the necessary powers.
- Check the granter has the mental capacity to support the use of the Power of Attorney where required.
- Check and record any restrictions detailed within the Power of Attorney (e.g. when the attorneys can act).
- Check and record whether joint attorneys can act jointly, jointly and severally or a combination.
- Check whether any changes need to be made to the account, such as where statements should be sent, or payments should be made.
- Complete any additional anti money laundering / customer due diligence checks required for any people with authority to act on the account.
- Update all relevant customer records to indicate the Power of Attorney has been received and who has authority to act on the account.

## Can a customer open an ISA with a Power of Attorney?

Yes, ISA applications (to make a subscription) can be made under a Continuing Power of Attorney, subject to any restrictions in the document.

Where the investor is physically incapable of signing or is a member of the armed forces on active service in a war zone, ISA applications can be made under a General Power of Attorney.

Once an ISA has been opened there are no rules about who can operate the account. Instructions received, including transfer, withdrawal and closure requests should be treated in the same way as any non-ISA account. Only applications to open an ISA with a subscription are subject to additional HMRC requirements.

## Gifts

There may be a specific power in the Power of Attorney that refers to gifts and the extent of the gifting power.

Where firms are unsure as to the specifics or extent of the power, legal advice may need to be sought.

## Withdrawals

Withdrawal requests made by the attorney should be processed per firms' usual processes and procedures.

Where an attorney requests a payment to be made to someone other than the granter and a firm does not allow third party payments, they are not required to do so.