

ASIFMA POA Guidelines 24 Sep 2015 - DRAFT

1. Preamble and Context

On 24 September 2015, ASIFMA released a statement regarding the use of powers of attorney for Hong Kong IPOs. That statement took note of the continued emergence of a unique practice in connection with certain Hong Kong IPOs pursuant to which less senior underwriting syndicate members, including joint bookrunners, are required to execute broad, irrevocable powers of attorney in favor of global coordinators, sometimes immediately upon being invited to join the syndicate, and at times before the resolution of one or more critical matters, including (i) determination of the principal commercial terms of the transaction; (ii) finalization of definitive transaction documentation; and (iii) customary syndicate member due diligence.

ASIFMA further noted that the use of powers of attorney in the manner that was emerging in Hong Kong posed potential risks to underwriting syndicate members from regulatory, risk management and corporate governance perspectives.

ASIFMA continues to believe that, except in very limited circumstances, there are no features unique to Hong Kong IPOs that mandate the use of powers of attorney among underwriting syndicate members beyond that which is customary in other international equity capital markets transactions. Nevertheless, ASIFMA noted that the use of powers of attorney can help alleviate logistical and practical difficulties associated with extraordinarily large underwriting syndicates that are somewhat unique to Hong Kong's very largest IPOs.

ASIFMA formed a working group for the purposes of addressing its concerns with respect to the use of powers of attorney on Hong Kong IPOs in order to publish these guidelines. These guidelines define the very limited circumstances in which it may be appropriate to use of powers of attorneys and set out the minimum standards for their use in such circumstances.¹

2. Basic Principles

- 2.1 The use of powers of attorney should be strictly limited to only those circumstances in which they will provide a material benefit in alleviating particular logistical and practical difficulties associated with extraordinarily large underwriting syndicates, which should be construed to mean not less than twelve syndicate members (inclusive of the joint global coordinators).

¹ These guidelines address the unique practice described in the preamble; the guidelines are not intended to address the more customary and well established practice of formally inviting very junior syndicate members to participate in an offering immediately prior to launch pursuant to a telex setting out the final details of the offering. Under this more customary practice, the junior syndicate members are generally involved in the transaction on a less formal basis prior to receiving the telex and appropriate accommodation is made for the concerns addressed by these guidelines.

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- 2.2 Where powers of attorney will materially alleviate such difficulties, the manner of implementation should be consistent with mitigating the associated potential risks to less senior underwriting syndicate members to the fullest extent practical.
- 2.3 The decision to invite an investment bank to join an underwriting syndicate rests with the issuer, and global coordinators should not utilize powers of attorney to coerce the behavior or limit the access of newly joined underwriting syndicate members or for any other purpose inconsistent with these guidelines.
- 2.4 An issuer should not be, nor should it be led to believe it is, the direct or indirect beneficiary of a power of attorney granted by a syndicate member.
- 2.5 Global coordinators requesting the powers of attorney should apply these basic principles and, together with legal counsels for the offering, ensure issuers are fully aware of these guidelines.

3. **Timing**

- 3.1 Powers of attorney should generally be executed as late in the transaction as is possible without compromising their benefits.
- 3.2 In order to accommodate appropriate timing, the powers of attorney with respect to the Hong Kong public offer agreements should be bifurcated from the powers of attorney with respect to the international offering agreements. The relevant powers of attorney should not be requested until the relevant documents are approaching finalization and the principal commercial terms of the transaction have been agreed.²
- 3.3 Typically, powers of attorney with respect to the Hong Kong public offering agreements should not be requested until the time of bulk print of the Hong Kong prospectus and the powers of attorney with respect to the international offering agreements should not be requested until the time of distribution of the preliminary international offering circular.³
- 3.4 Under no circumstances should powers of attorney be sought prior to the completion of customary syndicate member due diligence; where powers of attorney are sought in connection with a transaction, the global coordinators should ensure an appropriate due diligence process,

² ASIFMA notes that certain of its members are of the view that the negotiation of the Hong Kong underwriting agreement (and therefore many aspects of the international underwriting agreement) form a necessary part of sponsor due diligence to be conducted prior to the time of A-1 filing and/or should be substantially completed prior to the time of A-1 filing given the reputational issues associated with being publicly named in an issuer's A-1 filing. Similarly, other members encourage the finalization of the Hong Kong underwriting agreement prior to pre-deal investor education. These practices would, in part, facilitate compliance with these guidelines.

³ Proponents of the use of powers of attorney in the manner addressed by these guidelines have argued that it is necessary to have the powers of attorney in place prior to launch in order to ensure that less senior syndicate members cannot withdraw from the relevant transaction once the preliminary international offering circular has gone to print. ASIFMA notes that it would be only in the very rarest of circumstances that less senior syndicate members would consider withdrawal from the type of Hong Kong IPO in which the use of powers of attorney contemplated by these guidelines may be appropriate and that the withdrawal risk would be further reduced if those syndicate members are given sufficient access and transparency regarding underwriting commitments, fees and roles prior to the launch of the transaction. The limitations and conditions for the use of powers of attorney set out in these guidelines are specifically aimed at avoiding the occurrence of such circumstances to the extent it is within the control of the underwriting syndicate. Additionally, a withdrawal of a junior syndicate member following distribution of the preliminary offering circular is not necessarily material information, and any such eventuality could customarily be addressed through the pricing supplement.

including access to underwriters' counsel, is made available to the joining underwriting syndicate members prior to any request for execution of powers of attorney, and in no event should invitations to less senior syndicate members be received later than two business days prior to launch.

3.5 The due diligence process should include but is not limited to:

- (a) access to a materially complete and up to date prospectus and/or preliminary offering circular;⁴
- (b) access to the legal counsels to the underwriters, who should make available orally or in writing a reasonably detailed summary of the due diligence process undertaken by the global coordinators and identify any material issues that have arisen during the due diligence process;
- (c) access to sufficient documentation to conduct a summary due diligence review, which may include access the due diligence notes taken by legal counsels for the underwriters or reasonable alternative documentation; and
- (d) access to management of the issuer, its auditor and any material third parties or experts.

3.6 It is the responsibility of the less senior underwriting syndicate members to expeditiously avail themselves of the due diligence process made available by the global coordinators in the manner specified above and not to use such due diligence process for any purpose other than satisfying reasonable internal requirements and establishing a customary due diligence defense.

3.7 Global coordinators should ensure the transaction timeline, including the timing of the invitation for less senior members to join the underwriting syndicate, accommodates these requirements.

4. **Limitations**

4.1 It is recognized that the practicalities of executing Hong Kong IPOs, and particularly the type of Hong Kong IPOs likely to have extraordinarily large underwriting syndicates, will require that some level of discretion reside with global coordinators under the powers of attorney if they are to successfully achieve their intended benefits. However, it is inappropriate for powers of attorney to confer on global coordinators unnecessarily broad discretion to bind less senior underwriting syndicate members to unspecified contractual obligations to be contained in an underwriting agreement and an agreement among underwriters or otherwise impair a less senior underwriting syndicate members from evaluating the disclosure liabilities associated with a global offering of securities and take appropriate measures to establish due diligence defenses. Therefore, the discretion granted to global coordinators pursuant to powers of attorney should

⁴ The issuer's previously filed A1 for the transaction would not reflect, among other things, the comments of the Hong Kong Stock Exchange and may not even include the most recent financial statements and accompanying disclosure that are intended to be included in the offering documents. Therefore, a public link to an issuer's A1 filing should not be viewed as materially complete and up to date under the timing requirements set out in these guidelines.

be absolutely limited with respect to certain matters. At a minimum, the global coordinators should be precluded from utilizing powers of attorney to:

- (a) agree changes to the maximum offering price;
- (b) agree changes to the maximum offering size;
- (c) agree changes to the maximum underwriting commitment of the relevant underwriting syndicate member;
- (d) agree to price the transaction if the book is not fully covered;
- (e) agree changes to the fees payable to the relevant underwriting syndicate member;
- (f) agree any provision of an agreement among underwriters that provides for any expense or liability allocation to the relevant underwriting syndicate member that is disproportional to that syndicate member's final underwriting commitment;⁵
- (g) [agreeing any material changes to the underwriting agreements and the agreements among underwriters from the forms approved by the relevant syndicate member;]
- (h) agree any provision of the underwriting agreements or agreements among underwriters that authorizes a global coordinator that is an affiliate of the issuer or another interested party to bind the relevant underwriting syndicate without the consent of a wholly independent global coordinator; and
- (i) agree any material change to the prospectus or the international offering circular approved by the relevant syndicate member (whether prior to printing or by way of supplement).

4.2 Additionally, global coordinators should not impede legal counsels to the underwriters from disclosing any material due diligence issues that arise subsequent to the execution of a power of attorney by an underwriting syndicate member. Any authority granted pursuant to the power of attorney should be subject to the satisfactory resolution of any such issue in the reasonable judgment of the relevant underwriting syndicate member.

4.3 The powers of attorney should include a termination or expiration date/time for the effectiveness of the power. Powers of attorney that are evergreen with no expiration should not be used.

⁵ Agreements among underwriters for Hong Kong IPOs are customarily executed concurrently with the relevant underwriting agreement. However, ASIFMA notes that, for many of the same reasons underlying the increased use of powers of attorney on Hong Kong IPOs, an accompanying trend has emerged wherein agreements among underwriters are increasingly executed at later stages, or even following completion, of HK IPOs. These guidelines require that the principal terms to be embodied in the agreement among underwriters be settled prior to the delivery of powers of attorney. Consequently, the relevant agreement among underwriters can, and should, be executed concurrently with the relevant underwriting agreement in order that the economic terms and legal protections provided to less senior syndicate members in the relevant agreement among underwriters become effective concurrently with the assumption of underwriting risk by syndicate members pursuant to the relevant underwriting agreement.

- 4.4 The appropriate method of implementation of these limitations will depend on the circumstances, but may include:
- (a) the express inclusion of the foregoing limitations and conditions in powers of attorneys;
 - (b) delivery of powers of attorney to counsel under escrow arrangements that impose the foregoing limitations and conditions prior to release;
 - (c) a general obligation on global coordinators to periodically notify the junior underwriting syndicate members of any matters outside the limitations and conditions set out above, immediately followed by a brief but reasonable period of time during which the powers of attorney are revocable; and
 - (d) a scheduled bring-down update call among the underwriting syndicate and legal counsel to the underwriters during which any matters outside the limitations and conditions set out above are disclosed to the junior underwriting syndicate members, immediately followed by a brief but reasonable period of time during which the powers of attorney are revocable.

Template forms of powers of attorney for Hong Kong underwriters and international underwriters (the "**Templates**") for use on Hong Kong IPOs under the circumstances permitted by these guidelines are included as [Annex A](#) and [Annex B](#) to these guidelines, respectively. Any person using the Templates shall be deemed to have read, understood and agreed to the terms set out in [Exhibit A](#) to these guidelines.

5. **Appropriate Recipients**

- 5.1 Generally, the exercise of the authority granted under powers of attorney should require the consent of all of the global coordinators for the relevant transaction. Under no circumstances should the authority granted under powers of attorney be exercisable by a global coordinator that is an affiliate of the issuer or another interested party without the consent of a wholly independent global coordinator.
- 5.2 Powers of attorney should identify the specific legal entities that will have the power to sign documents. In other words, it should not grant authority to roles on the syndicate (e.g., the joint global coordinators for the offering).

EXHIBIT A

Terms of Use for Templates

The Templates should be read in connection with "ASIFMA POA Guidelines" published by ASIFMA on 24 September 2015, and are intended for use solely in the circumstances prescribed by those guidelines. Any person using the Templates shall be deemed to have read, understood and agreed to the following terms:

- 1.1 The Templates are provided solely as guides and are not intended to be, and must not be regarded or relied upon as, legal or other professional advice or opinions on any matters. Use of the Template is voluntary. You are advised to seek your own professional advice as necessary.
- 1.2 All market participants granting or receiving a power of attorney are responsible for exercising their own independent judgment as to whether the form of power of attorney is appropriate under the particular circumstances and conditions, including (a) whether the power of attorney legally and validly grants, irrevocably or otherwise, the powers contemplated by such power of attorney; and (b) whether the granting or exercise of such powers complies with relevant legal, regulatory and other obligations.
- 1.3 Any descriptions of legal or regulatory provisions in the Templates are for informational and summary purposes only and are not intended to convey the full extent or details of regulatory obligations that may apply to any firm or individual. Any persons using the Template are encouraged to undertake their own review of relevant laws, rules, codes, guidelines and circulars and other materials, and are responsible for making their own determination as to their legal, regulatory and other obligations.
- 1.4 ASIFMA, its member firms and any other persons who have contributed to the development of the Templates: (a) accept no responsibility or liability in any form for any errors or omissions in the Templates or for any losses or damages howsoever arising from, including any act or inaction in reliance on, any of their contents or omissions; (b) make no representations or warranties of any kind and specifically disclaim any implied representations or warranties of merchantability, fitness for a particular purpose, completeness or accuracy of the Templates; (c) make no representations that the use of or reference to the Templates will satisfy any legal, regulatory or other obligations; and (d) disclaim any on-going duty or obligation to update or revise the Templates or notify any persons of changes to laws, regulations or regulatory guidance that may affect the use or application of the Templates.

The Templates have been created for the benefit of all industry participants. It is not owned, copyrighted or protected by ASIFMA.

ANNEX A

Template Power of Attorney for Hong Kong Underwriters

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ANNEX B

Template Power of Attorney for International Underwriters

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