GUIDANCE NOTE: ROME II REGULATION AND CHOICE OF LAW CLAUSES

Summary: The Rome II regulation governing choice of law by EU courts in non-contractual matters (e.g., tort) takes effect on 11 January 2009. Rome II allows parties to specify in relevant agreements the law that would apply to such actions. Although these matters are never free from doubt, the European Primary Markets Division recommends that members take immediate advantage of the opportunity to specify in equity capital markets transaction agreements that the law that would govern the contract would also apply to non-contractual causes of action.

Model language: “This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [applicable] law”.

Discussion: Regulation 864/2007 on the law applicable to non-contractual obligations replaces the various laws of EU Member States (excluding Denmark) with a uniform rule to determine the law that would apply to a non-contractual dispute. Absent a contractual provision designating a particular body of law, Member State courts will (with some exceptions not relevant here) look to the law of the country where the damage occurs.2

Members commonly include choice of law clauses to govern the contractual aspects of a dispute (e.g., breach of a warranty). Broadening the scope of the provision to include non-contractual disputes (e.g., a cause of action that arises out of a breach of a representation) will attain some certainty that the law of a chosen jurisdiction will apply regardless of the legal basis of the action, and will obviate litigation over the issue of applicable law.

The price of certainty is flexibility. Operation of the clause could deprive members of the ability to claim against the issuer under a more favourable law, a particular concern if the member finds itself defending an action by an investor under such a law. Given that this contingency cannot be identified with any certainty at the time an agreement is executed, we expect that members will prefer the legal certainty that agreeing applicable law in advance will afford.

Although Rome II does not take effect until 11 January 2009, the EPMD recommends that members begin including the language immediately as the regulation covers events giving rise to damage which occur from 20 August 2007. In addition, contracts entered into prior to January 2009 will, in many cases, remain operative beyond the effective date of the regulation.

Questions about the regulation or the model language may be directed to Lorraine Charlton, Managing Director of the European Primary Markets Division at lcharlton@sifma.org, or by telephone on +44 (0)20 7743 9304.

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1 This is a summary of the regulation and several key issues that we believe may be of interest to you. It should not be relied upon as legal advice.

2 Most Member States (including the UK) currently look to the law of the country where the harmful act was committed.