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## Brexit and the Irish Law ISDA Master Agreement

### 1. Introduction

With the reality of Brexit continuing to loom large in the financial services industry generally and market participants looking to formulate their contingency arrangements for whatever form Brexit may take, the publication of an Irish law ISDA Master Agreement by the International Swaps and Derivatives Association (“ISDA”) is a welcome development. The ISDA Master Agreement is the globally accepted form of agreement used by large corporations, financial institutions and investment vehicles to document their over-the-counter derivative transactions.

### 2. Governing Law – Why is it important?

Until now users of derivatives had the choice of either English law or New York law to govern the terms of their derivative trading under the ISDA Master Agreement and the corresponding choice to submit to the jurisdiction of the English courts or New York courts for the resolution of their disputes. To date, the English law option has more often than not been the preferred option for those counterparties whose operations are substantially carried out in the EU and who seek to ensure that their contracts are governed by a law within the EU legal framework. The benefits for users of derivatives of using ISDA Master Agreements governed by a law within the EU legal framework include:

- ▣ the automatic recognition and enforcement of judgments obtained in one EU Member State in other EU Members States;
- ▣ the legislative framework protecting financial collateral arrangements and providing certainty on certain insolvency related matters.

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### 3. Irish law – A realistic alternative

The introduction of an Irish law governed ISDA Master Agreement as an alternative to the English law governed ISDA Master Agreement is a logical move in light of Brexit. In many ways it will allow for "business as usual" with respect to the governance of derivatives trading by those entities which have to date used English law governed ISDA Master Agreements. Irish law and English law are both common law systems and are substantially similar in many respects. It is worth noting that only those provisions relating to governing law and submission to jurisdiction have been amended in the Irish law version of the ISDA Master Agreement. Irish courts will often have regard to decisions of the English courts with respect to points of law and this will likely be particularly the case as Irish courts are asked to consider disputes arising out of the Irish law governed ISDA Master Agreement.

All of this is good news for the Irish financial services industry and will be of particular interest to those regulated investment funds, insurance companies and other financial institutions that are established in Ireland. The prospect of being able to enter into Irish law governed agreements and to ensure that any proceedings arising out of those agreements will be heard in the Irish courts will no doubt give those entities greater legal certainty as to the impact of Brexit on their derivatives trading whether derivatives form a core part of the investment strategy or are used for hedging and other efficient portfolio management purposes.

As you consider your Brexit contingency arrangements and review the contractual framework in which your trading activities operate, Dillon Eustace is well placed to assist and advise with respect to the negotiation of your contractual arrangements, the benefits of electing to use the Irish law ISDA Master Agreement and any proposal to transition existing arrangements governed by English law to Irish law governed ISDA Master Agreements.

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