

## THE JOBS ACT: IMPLICATIONS FOR UCITS SPONSORS

### INTRODUCTION

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (the "JOBS Act"), a collection of reforms to the U.S. federal securities laws designed to reduce the regulatory burdens on small businesses and facilitate capital formation.<sup>1</sup> Although the JOBS Act is primarily aimed at helping small and emerging businesses grow and create jobs, the legislation should also provide significant benefits to sponsors of Undertakings for Collective Investment in Transferable Securities ("UCITS") who intend to offer UCITS to U.S. persons. In particular, the JOBS Act (i) raises the threshold for the number of U.S. investors a UCITS can have before it becomes a U.S. public company and (ii) permits general solicitation or general advertising in connection with U.S. offerings of UCITS so long as all U.S. purchasers in the offering are "accredited investors."<sup>2</sup>

<sup>1</sup> The text of the JOBS Act, as passed by the House on March 27, 2012, is available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf>. For a more comprehensive discussion of the changes to U.S. federal securities laws instituted by the JOBS Act, please see our earlier client alert, *The U.S. Jumpstart Our Business Startups Act (The JOBS Act)*, available at <http://www.curtis.com/siteFiles/Publications/Public%20Company%20Client%20Alert.pdf>

<sup>2</sup> In general, an "accredited investor" includes (i) any entity with assets in excess of \$5 million and (ii) any natural person (a) whose net worth, either alone or together with the person's spouse, exceeds \$1 million, excluding the value of the person's primary residence, or (b) whose income exceeded \$200,000 (or \$300,000 together with a spouse) in each of the two most recent years and who has a reasonable expectation of the same income level in the current year.

### RESTRICTIONS ON UCITS OFFERINGS TO U.S. PERSONS

Sponsors of UCITS need to carefully consider applicable U.S. securities laws before attempting to extend a UCITS offering to U.S. persons. Whereas a UCITS can be offered to retail investors throughout the European Union, UCITS offerings to U.S. persons have traditionally been limited to private offerings to sophisticated investors in order to avoid triggering burdensome registration and disclosure requirements under U.S. securities laws.

Typically, a UCITS offering to U.S. persons is structured as a private offering pursuant to Rule 506 of Regulation D under the U.S. Securities Act of 1933 (the "Securities Act"). Prior to the JOBS Act, compliance with Rule 506 required that a UCITS offering in the United States be extended only to U.S. persons who qualify as accredited investors and with whom the UCITS sponsor had a preexisting relationship. In other words, a UCITS could not be offered to U.S. persons through general solicitation or general advertising without the offering being subject to registration under the Securities Act.

Furthermore, because a UCITS invests primarily in transferable securities, it would be considered an "investment company" subject to registration under the U.S. Investment Company Act of 1940 (the "Investment Company Act") unless it qualifies for an exemption. The two most common exemptions from registration used by UCITS are Sections 3(c)(1) and 3(c)(7) of the Investment Company Act. The Section 3(c)(1) exemption is available to a UCITS that limits the number of its U.S. investors to no more than 100, while the Section 3(c)(7) exemption is available to a UCITS that limits its U.S. investors to "qualified purchasers."<sup>3</sup> Because a UCITS relying

<sup>3</sup> In general, a "qualified purchaser" includes (i) an entity that

on either the Section 3(c)(1) or 3(c)(7) exemption from Investment Company Act registration is prohibited from engaging in a public offering of its securities, interests in such UCITS are typically offered and sold to U.S. persons only in private offerings pursuant to Rule 506 of Regulation D under the Securities Act.

## **GENERAL SOLICITATION AND GENERAL ADVERTISING OF UCITS OFFERINGS UNDER RULE 506 OF REGULATION D**

The JOBS Act makes it easier for UCITS sponsors to offer interests in UCITS to U.S. persons without having to register the offering under the Securities Act. Section 201 of the JOBS Act directs the SEC to revise Rule 506 to remove the prohibition against general solicitation or general advertising in connection with Rule 506 offerings where all purchasers of the securities sold in the offering are accredited investors. The revised Rule 506 must also require that the issuer take reasonable steps to verify that purchasers of the securities are accredited investors using such methods as will be determined by the SEC. The JOBS Act gives the SEC 90 days following the passage of the Act to make the necessary rule revisions.

Furthermore, Section 201(b)(2) of the JOBS Act clarifies that offers and sales conducted pursuant to Rule 506 “shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.” Accordingly, subject to the adoption of the SEC’s amendments to Rule 506, UCITS sponsors should be able to use general advertising or general solicitation to offer interests in a UCITS relying on the exemptions from Investment Company Act registration provided by Sections 3(c)(1) or 3(c)(7) without jeopardizing their ability to rely on those exemptions. As a result, we expect that UCITS

owns and invests at least \$25 million on a discretionary basis for its own account or for the accounts of other qualified purchasers and (ii) a natural person who, either alone or together with a spouse, owns at least \$5 million in investments.

sponsors will expand their use of websites and social media to market UCITS to U.S. persons under Rule 506.

## **INCREASED THRESHOLD FOR EXCHANGE ACT REPORTING**

Prior to the JOBS Act, Section 12(g) of the U.S. Securities Exchange Act of 1934 (the “Exchange Act”) required a company with more than \$10 million in total assets and a class of equity security “held of record” by 500 or more persons to register the class of equity security with the SEC. Because Exchange Act registration triggers public company reporting obligations, sponsors of UCITS that rely on the exemption from registration under Section 3(c)(7) of the Investment Company Act have tended to limit the number of investors in those UCITS to no more than 499 persons.<sup>4</sup>

Section 501 of the JOBS Act raises the record holder threshold in Section 12(g)(1)(A) of the Exchange Act from 500 persons to either (i) 2,000 persons or (ii) 500 persons who are not accredited investors. In addition, Section 502 of the JOBS Act amends Section 12(g)(5) of the Exchange Act to provide that the definition of “held of record” excludes securities held by persons who received the securities pursuant to an employee compensation plan in a transaction exempt from the registration requirements of Section 5 of the Securities Act. To assist issuers in structuring their employee compensation plans, Section 503 of the JOBS Act directs the SEC to adopt safe harbor provisions that issuers can follow when determining whether an employee security holder meets the exclusion. The JOBS Act amendments to the Section 12(g) record holder provisions take effect immediately; however, no deadline is given for the SEC to adopt safe harbor

<sup>4</sup> The 500 record holder threshold is generally not a concern for a UCITS relying on the exemption from registration provided by Section 3(c)(1) of the Investment Company Act, as that exemption is only available if the UCITS has no more than 100 beneficial owners.

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provisions for the employee security holder exclusion.

Because a UCITS relying on the Section 3(c)(7) exemption is limited to investors who are qualified purchasers – each of whom would also qualify as an accredited investor – these changes effectively increase the number of investors the UCITS can accept for each class of its securities from 499 to 1,999, plus any excluded employee security holders.

## CONCLUSION

Although UCITS that rely on either the 3(c)(1) or 3(c)(7) exemption from Investment Company Act registration will remain restricted from accepting U.S. retail investors, the JOBS Act reforms will enable UCITS sponsors to market these UCITS in the United States using general solicitation or general advertising under Rule 506 of Regulation D, so long as the UCITS only accepts investments from U.S. persons who qualify as accredited investors. In addition to expanding the U.S. marketing opportunities for UCITS, the JOBS Act reforms will enable a UCITS that relies on the 3(c)(7) exemption to increase the number of its U.S. investors to as many as 1,999 holders of each class of the UCITS' equity securities without becoming subject to regulation as a U.S. public company. Accordingly, we expect that UCITS sponsors will increase their marketing efforts in the United States in the wake of these changes.

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