HENNION & WALSH

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July 20, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Valuation Rule 2a-5; Investment Company Act Rel. No. 33845
(the *"Proposing Release"*); File No. S7-07-20

Dear Ms. Countryman:

The undersigned Hennion & Walsh, Inc. (*"Hennion & Walsh"*) appreciates the opportunity to offer comments to the Securities and Exchange Commission (the *"Commission"*) on the Commission's proposed new Rule 2a-5 (the *"Proposed Rule"*) under the Investment Company Act of 1940 (the *"Act"*) that would provide requirements for determining fair value in good faith with respect to a fund for purposes of Section 2(a)(41) of the Act. Under the Proposed Rule, the Commission proposes, among other things, that in the case of a unit investment trust (a *"UIT"*), the trustee of the UIT would conduct the fair value determinations. In the Proposing Release [1], the staff requests comments, among other things, as to whether a party other than the trustee should perform the various valuation functions, whether the trustee should be permitted to assign these determinations to another person, whether the trustee should have oversight responsibilities, and whether other modifications to the Proposed Rule would be appropriate. As outlined below, we believe that the Proposed Rule should have the flexibility to permit a UIT to have its trustee, principal underwriter, depositor or an evaluator designated in the UIT's trust indenture to perform the valuation functions of paragraph (a) in the Proposed Rule. Additionally, we request that the final rule make it clear that the requirements of paragraph (b) of the Proposed Rule are not applicable to UITs.

I. Background on Hennion & Walsh and Current UIT Valuation Practices

Hennion & Walsh is a broker-dealer registered with the Commission under the Securities Exchange Act of 1934. Hennion & Walsh has been serving as a depositor to UITs since 2003 under the brand name SmartTrust®. Over that time we have acted as depositor for over 500 UITs.

Section 2(a)(41) of the Act requires funds to value their portfolio investments using the market value of their portfolio securities when market quotations are readily available and when a market quotation is not readily available, by using the fair value of the securities "as

[1] See Good Faith Determinations of Fair Value, Investment Company Act Rel. No. 33845 (April 21, 2020).

determined in good faith by the fund's board." The section does not address how UITs should value their assets when market quotations are not readily available since UITs do not have a board of directors. Section 4(2) of the Act provides that a UIT "is organized under a trust indenture, contract of custodianship or agency, or similar instruments." That document is the governing document that sets forth the duties of the various parties connected with the organization and operation of the UIT. Each UIT's trust indenture sets forth a party who will be responsible for valuing the UIT's assets and the manner in which the assets will be valued. For Hennion & Walsh UITs, the party named in the trust indentures to performing these responsibilities is typically the trustee but this could vary in the future.

II. Our Comments on Proposed Rule 2a-5

Under the Proposed Rule, if a fund is a unit investment trust, the fund's trustee must carry out the requirements of paragraph (a) of the Proposed Rule. While this is consistent with the trust indentures and practices of existing Hennion & Walsh UITs, we believe it is inconsistent with the trust indentures and current industry practice of many UIT complexes and the approach taken in other rules in addressing UITs. Hennion & Walsh UITs currently have the trustee perform these valuation functions. However, in the future Hennion & Walsh may determine it is preferable to follow the widespread UIT practice of having its investment adviser affiliate Hennion & Walsh Asset Management, Inc. (who already acts as supervisor to Hennion & Walsh UITs) or an unaffiliated party serve as evaluator to future Hennion & Walsh UITs. In request for comment number 24 of the Proposed Rule, the staff asks whether it should "permit or require anyone other than the trustee of a UIT to perform the functions described in paragraph (a), such as a person appointed by the trustee...[including] allow[ing] the trustee to assign these determinations to the UIT's sponsor, principal underwriter, or depositor." We believe the rule should permit a UIT's fair value determinations to be carried out by its trustee, principal underwriter, depositor or an evaluator designated in the UIT's trust indenture, contract of custodianship or agency, or similar instrument.

Section 2(a)(41) of the Act does not address the approach an investment company without a board of directors should follow to value its portfolio holdings that do not have readily available market quotations. As industry practice developed over many years, the majority of UIT trust indentures provided for the depositor, an affiliate thereof or an independent evaluator to serve as the UIT's evaluator and be responsible for the valuation of the UIT portfolio holdings while others provided for the trustee to be responsible for the valuation of the UIT portfolio holdings.

In the Proposing Release, the staff cited Form N-7, Appendix B, Guide 2 (March 17, 1987) which proposed that the board's fair value role under Section 2(a)(41) be performed by the UIT's trustee "or the trustee's appointed person". In this regard, Form N-7 was only re-proposed and never adopted and therefore the proposal would not have reflected any additional comments received. Nevertheless, proposed guidelines provided the flexibility that the trustee could appoint another party to perform that function. We believe the Proposed Rule should be revised to permit a UIT to utilize an evaluator specified in the trust indenture

which may be the trustee, principal underwriter, depositor or another party named as evaluator to perform the valuation functions described in paragraph (a) of the Proposed Rule.

We believe that structuring the rule in this manner would be consistent with the approach the staff has taken in addressing UITs in other rules. For example, in the recently adopted Rule 22e-4 on fund liquidity, the Commission adopted a limited review requirement for UITs pursuant to which the UIT's *principal underwriter or depositor* must determine, on or before the initial deposit of portfolio securities into the UIT, that the portion of the illiquid investments that the UIT holds or will hold at the date of deposit that are assets is consistent with the redeemable nature of the securities it issues. In addition, the Proposing Release recognizes that Rule 38a-1 requires a fund to adopt compliance policies and procedures and that such rule would apply to a fund's obligations under the proposed Rule 2a-5. Under Rule 38a-1, a UIT's principal underwriter or depositor must approve the fund's policies and procedures and chief compliance officer, must receive all annual reports and must approve the removal of the chief compliance officer from his or her responsibilities.

Although Rule 22e-4 and 38a-1 only reference the principal underwriter or depositor, we recommend allowing for valuation functions to be performed by the trustee or another party named as evaluator in a UIT's trust indenture. Many UITs utilize a separate named evaluator that is a registered investment adviser. We see no reason to deviate from continuing to allow these widespread practices in UITs. UITs generally do not raise the same level of conflicts of interest with respect to valuation as confronted by managed funds. UITs are unmanaged and do not have investment advisers with an advisory fee based on the value of assets under management which may create an incentive for a managed fund's investment adviser to overvalue portfolio holdings to obtain a larger fee. Further, we note that UITs, given their unmanaged nature and relatively fixed term, rarely hold Level 3 securities (as defined under Accounting Standards Codification 820, "Fair Value Measurements") which further limits UITs' valuation risks. Accordingly, we do not believe that UITs require the same level of oversight as in the case of an investment adviser performing the valuation functions in managed funds.

As a result, we propose that paragraph (d) of the Proposed Rule be adopted as follows:

"(d) *Unit investment trusts.* If the fund is a unit investment trust, the requirements of paragraph (a) must be carried out by the fund's trustee, principal underwriter, depositor or an evaluator designated in the fund's trust indenture, contract of custodianship or agency, or similar instrument."

Additionally, paragraph (b) of the Proposed Rule describes responsibilities of the board of directors of a management company or business development company under the Act. We request that the final rule make it clear that the requirements of paragraph (b) of the Proposed Rule are not applicable to UITs. Accordingly, we suggest changing the first sentence of paragraph (b) of the Proposed Rule to read "The board of a fund that is a registered management investment company or a business development company must determine fair

value in good faith for any or all fund investments by carrying out the functions required in paragraph (a) of this section."

We appreciate your consideration of the views set forth in this letter and we would be pleased to have the opportunity to discuss these matters further with you or with any member of the Commission staff. In the meantime, please feel free to contact the undersigned at (973) 299-8989 with any questions.

Sincerely,

HENNION & WALSH, INC.

By: Phillip Fitzsimmons, Chief Compliance Officer