

## SECURITIES AND EXCHANGE COMMISSION

[Release. No. IC-26207; 812-12971]

### Hennion & Walsh, Inc., et al.; Notice of Application

October 14, 2003.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application under: (i) Section 6(c) of the Investment Company Act of 1940 ("Act") for exemptions from sections 14(a) and 19(a) of the Act and from rule 19b-1 thereunder; (ii) sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act; and (iii) section 12(d)(1)(F) of the Act for an exemption from section 12(d)(1)(F)(ii) of the Act.

**SUMMARY OF APPLICATION:** Applicants Hennion & Walsh, Inc. ("Sponsor"), Smart Trust, Equity Securities Trust, Symphony Series, and EST Symphony Trust, as well as any other registered unit investment trust ("UIT") for which the Sponsor serves as the sponsor in the future (collectively, "Trusts") and any presently outstanding or subsequently issued series of the Trusts (each, a "Trust Series") request an order: (a) Under section 12(d)(1)(F) of the Act to permit each Trust Series to offer and sell to the public units ("Units") with a sales load that exceeds the 1.5 % limit in section 12(d)(1)(F)(ii) of the Act; (b) under sections 6(c) and 17(b) for an exemption from section 17(a) of the Act to permit the Trust Series to invest in affiliated registered investment companies within the limits of section 12(d)(1)(F) of the Act; and (c) under section 6(c) of the Act for exemptions from sections 14(a) and 19(b) of the Act and rule 19b-1 under the Act to permit Units to be publicly offered without requiring the Sponsor to take for its own account or place with others \$100,000 worth of Units, and to permit the Trust Series to distribute capital gains resulting from the sale of portfolio securities within a reasonable time after receipt.

**FILING DATES:** The application was filed on May 1, 2003 and amended on October 2, 2003.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 7, 2003 and should be accompanied by proof of

service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549-0609; Applicants: Peter J. DeMarco, c/o Hennion & Walsh, Inc., 2002 Route 46, Waterview Plaza, Parispany, New Jersey 07054.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Sr., Senior Counsel, at (202) 942-0714 or Nadya B. Roytblat, Assistant Director, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (tel. (202) 942-8090).

#### Applicants' Representations

1. The Sponsor, a broker-dealer registered under the Securities Exchange Act of 1934, will serve as the sponsor for the Trusts.<sup>1</sup> Each Trust Series is or will be a UIT registered under the Act and organized under a trust indenture that incorporates or will incorporate by reference a master trust agreement between the Sponsor and a qualified bank as trustee ("Trustee"). Pursuant to the trust indenture, the Sponsor will deposit into each Trust Series shares of existing registered investment companies ("Funds"), or contracts and monies for the purchase of shares of the Funds. The Funds will be closed-end or open-end investment companies or UITs. Certain of the Funds are open-end investment companies or UITs that have received exemptive relief under the Act to sell their shares at negotiated prices on an exchange ("Exchange Traded Funds").

2. The purpose of each Trust Series is to provide retail investors (1) an investment with a professionally selected asset allocation model or investment theme based upon the Sponsor's assessment of the overall economic climate and financial markets, and (2) the opportunity for income and/

or capital appreciation through a diversified fixed portfolio of Funds professionally selected by the Sponsor from the total population of available Funds within the various market sectors of the Sponsor's asset allocation model or consistent with the enunciated investment theme. Applicants anticipate that certain of the Funds selected may be advised and/or distributed by the Sponsor or one of its affiliates ("Affiliated Funds"). Applicants anticipate that most of the Funds selected will be unaffiliated with the Sponsor ("Unaffiliated Funds"). Applicants state that the Trust Series' investments in Affiliated Funds and Unaffiliated Funds will comply with section 12(d)(1)(F) in all respects except for the sales load restriction of section 12(d)(1)(F)(ii).

3. The only Funds that will be eligible for inclusion in a Trust Series are either no load Funds or Funds which, although they offer shares with a front-end sales charge to the public, agree to waive any otherwise applicable front-end sales load with respect to all shares sold or deposited in any Trust Series. Shares of each of the Funds (except closed-end Funds and Exchange Traded Funds), therefore, will be sold for deposit into any Trust Series at net asset value. Shares of closed-end Funds and Exchange Traded Funds will be purchased by a Trust Series at market prices. Investors in the Trust Series ("Unitholders") will pay a specified sales load to the Sponsor in connection with the purchase of their Units.

4. No evaluation fee will be charged with respect to determining the value of the Funds' shares that comprise the Trust Series' portfolio. The Trustee will receive service fees under a rule 12b-1 plan from certain Funds to compensate it for providing servicing and sub-accounting functions with respect to Fund shares held by a Trust Series. In such cases, the Trustee will reduce its regular fee to a Trust Series directly by the fees it receives from the Funds and rebate any excess fees it receives to the Trust Series. Any fees so rebated will be utilized by the Trust Series to absorb other bona fide Trust Series expenses. To the extent that these fees exceed the total Trust Series' expenses, the excess will be distributed along with other income earned by the Trust Series.

#### Applicants' Legal Analysis

##### A. Section 12(d)(1) of the Act

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company if those securities represent more than 3% of the

<sup>1</sup> All existing Trusts that currently intend to rely on the requested order have been named as applicants. Any other existing or future Trust that may rely on the order in the future will do so only in accordance with the terms and conditions of the application.

acquired company's total outstanding voting stock, more than 5% of the acquiring company's total assets, or if the securities, together with the securities of any other acquired investment companies, represent more than 10% of the acquiring company's total assets.

2. Section 12(d)(1)(F) of the Act provides that section 12(d)(1) does not apply to an acquiring company if the company and its affiliated persons own no more than 3% of an acquired company's total outstanding securities, provided that the acquiring company does not impose a sales load of more than 1.5%. In addition, the section provides that no acquired company may be obligated to honor any acquiring company's redemption request in excess of 1% of the acquired company's securities during any period of less than 30 days, and the acquiring company must vote its acquired company shares either in accordance with instructions from its shareholders or in the same proportion as all other shareholders of the acquired company.

3. A Trust Series will invest in Affiliated and Unaffiliated Funds in reliance on section 12(d)(1)(F) of the Act. If the requested relief is granted, the Trust Series will offer Units to the public with a sales load that exceeds the 1.5% limit in section 12(d)(1)(F)(ii).

4. Section 12(d)(1)(J) of the Act provides that the Commission may exempt persons or transactions from any provision of section 12(d)(1), if and to the extent that such exemption is consistent with the public interest and the protection of investors.

5. Applicants have agreed, as a condition to the requested relief, that any sales charges and/or service fees with respect to Units of a Trust Series will not exceed the limits set forth in rule 2830 of the National Association of Securities Dealers, Inc. ("NASD") Conduct Rules applicable to a fund of funds. Applicants believe that it is appropriate to apply the NASD's rule to the proposed arrangement instead of the sales load limitation in section 12(d)(1)(F)(ii) because the proposed limit would cap the aggregate sales charges that may be imposed by a fund of funds. Applicants assert that the NASD's rule more accurately reflects today's regulatory environment with respect to the methods by which investment companies finance sales expenses.

6. Applicants state that, with respect to shares of closed-end Funds or Exchange Traded Funds held by a Trust Series, no front-end sales load, contingent deferred sales charges, rule 12b-1 fees, or other distribution fees or

redemption fees will be charged in connection with the sale or purchase of Fund shares by a Trust Series.

Applicants state that although the Trust Series likely will incur brokerage commissions in connection with its market purchases of shares of closed-end Funds or Exchange Traded Funds, these commissions will not differ from commissions otherwise incurred in connection with the purchase or sale of comparable securities.

7. Applicants also agree, as a condition to the requested relief, that each Trust Series will not invest in any underlying Fund which owns securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

#### *B. Section 17(a) of the Act*

1. With regard to the Trust Series' investments in Affiliated Funds, applicants request relief from section 17(a) of the Act under sections 6(c) and 17(b). Section 17(a) of the Act generally prohibits an affiliated person, or an affiliated person of an affiliated person, of a registered investment company from selling securities to, or purchasing securities from, the company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include any person directly or indirectly controlling, controlled by, or under common control with the other person. Applicants submit that the Trust Series and Affiliated Funds may be deemed to be affiliated persons of one another by virtue of being under common control of the Sponsor. Applicants state that purchases and redemptions of shares of the Affiliated Funds by a Trust Series could be deemed to be principal transactions between affiliated persons under section 17(a).

2. Section 6(c) of the Act provides that the Commission may exempt persons or transactions from any provisions of the Act if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act provides that the Commission will exempt a proposed transaction from section 17(a) if evidence establishes that: (a) The terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching; (b) the proposed transaction is consistent with the policies of the registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

3. Applicants state that shares of Affiliated Funds will be sold to the Trust Series at net asset value, or, in the case of closed-end Affiliated Funds, at market prices. As a result, applicants believe that the proposed terms and conditions of the Trust Series' transactions in Affiliated Fund shares, including the consideration to be paid or received, will be reasonable and fair and will not involve overreaching on the part of any person concerned. Furthermore, applicants state that the proposed transactions will be consistent with the policies of the Trust Series as recited in their registration statements.

#### *C. Section 14(a) of the Act*

1. Section 14(a) of the Act requires in substance that a registered investment company have \$100,000 of net worth prior to making a public offering. Applicants believe that each Trust Series will comply with this requirement because the Sponsor will deposit substantially more than \$100,000 of Fund shares in each Trust Series. Applicants assert, however, that the Commission has interpreted section 14(a) as requiring that the initial capital investment in an investment company be made without any intention to dispose of the investment. Applicants state that, under this interpretation, a Trust Series would not satisfy section 14(a) because of the Sponsor's intention to sell all of the Units of the Trust Series.

2. Rule 14a-3 under the Act exempts UITs from section 14(a) if certain conditions are met, one of which is that the UIT invest only in "eligible trust securities," as defined in the rule. Applicants submit that the Trust Series cannot rely on the rule because Fund shares are not eligible trust securities. Consequently, applicants seek an exemption under section 6(c) from the net worth requirement of section 14(a) of the Act. Applicants state that the Trust Series and the Sponsor will comply in all respects with the requirements of rule 14a-3, except that the Trust Series will not restrict their portfolio investments to "eligible trust securities."

#### *D. Section 19(b) of the Act*

Section 19(b) of the Act and rule 19b-1 under the Act provide that, except under limited circumstances, no registered investment company may distribute long-term gains more than once every twelve months. Rule 19b-1(c), under certain circumstances, excepts a UIT investing in "eligible trust securities" (as defined in rule 14a-3) from the requirements of rule 19b-1. Because the Trust Series do not limit

their investments to "eligible trust securities," the Trust Series do not qualify for the exemption in paragraph (c) of rule 19b-1. Therefore, applicants request an exemption under section 6(c) from section 19(b) and rule 19b-1 to the extent necessary to permit capital gains earned in connection with the redemption and sale of Fund shares to be distributed to Unitholders along with the Trust Series' regular distributions. Applicants state that, in all other respects, the Trust Series will comply with section 19(b) and rule 19b-1. Applicants assert that the abuses that section 19(b) and rule 19b-1 were designed to prevent do not exist with regard to the Trust Series. Applicants state that any gains from the redemption or sale of Fund shares would be triggered by the need to meet Trust Series' expenses or by requests to redeem Units, events over which the Sponsor and the Trust Series have no control.

#### Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Each Trust Series will comply with section 12(d)(1)(F) in all respects except for the sales load limitation of section 12(d)(1)(F)(ii).

2. Any sales charges and/or service fees (as those terms are defined in NASD Conduct Rule 2830) charged with respect to Units of a Trust Series will not exceed the limits set forth in NASD Conduct Rule 2830 applicable to a fund of funds (as defined in NASD Conduct Rule 2830).

3. No Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

4. The Trust Series and the Sponsor will comply in all respects with the requirements of rule 14a-3, except that the Trust Series will not restrict their portfolio investments to "eligible trust securities."

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the

Securities and Exchange Commission will hold the following meetings during the week of October 20, 2003: A Closed Meeting will be held on Tuesday, October 21, 2003 at 2 p.m., and an Open Meeting will be held on Wednesday, October 22, 2003 at 10 a.m., in Room 1C30, the William O. Douglas Room.

Commissioner Campos, as duty officer, determined that no earlier notice thereof was possible.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(5), (7), (8), (9)(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Campos, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Tuesday, October 21, 2003 will be: Institution and settlement of administrative proceedings of an enforcement nature; Institution and settlement of injunctive actions; Formal orders of investigation; Regulatory matters regarding a financial institution; and Opinion.

The subject matter of the Open Meeting scheduled for Wednesday, October 22, 2003 will be:

1. The Commission will consider whether to propose new Rule 15a-5 under the Investment Company Act of 1940 ("Investment Company Act"). Proposed Rule 15a-5 would permit an investment adviser to manage an open-end investment company's ("fund") assets without approval by fund shareholders, under certain conditions. The Commission also will consider whether to amend Form N-1A under the Investment Company Act and the Securities Act of 1933. The recommended amendments would include a requirement that any fund operating under the exemption in proposed Rule 15a-5 disclose that investment advisers may be hired without shareholder approval.

For further information, please contact Adam B. Glazer at (202) 942-0690.

2. The Commission will consider whether to adopt amendments to Rule 10b-18 (the safe harbor rule regarding issuer repurchases) under the Securities Exchange Act of 1934 ("Exchange Act"),

and amendments to Regulations S-K and S-B under the Exchange Act, and Exchange Act Forms 10-Q, 10-QSB, 10-K, 10-KSB, 20-F (regarding foreign private issuers), and Form N-CSR under the Exchange Act and the Investment Company Act of 1940 that would require periodic disclosure of all issuer repurchases of equity securities, regardless of whether the repurchases are effected in accordance with Rule 10b-18.

For further information, please contact Joan Collopy or Elizabeth Sandoe at (202) 942-0772.

#### 3. Proposed Regulation SHO.

The Commission will consider whether to propose for public comment new Regulation SHO regulating short sales under the Securities Exchange Act of 1934, which would replace current Rules 3b-3, 10a-1 and 10a-2. Among other things, Regulation SHO would institute a new uniform bid test, applicable to exchange-listed and Nasdaq National Market System securities, that would allow short sales to be effected at a price above the consolidated best bid. Regulation SHO would also suspend the operation of the proposed bid test for specified highly liquid securities on a two-year pilot basis. Regulation SHO would also require short sellers in all equity securities to locate securities to borrow before selling short, and add further requirements to address "naked" short selling.

The Commission will also consider simultaneously whether to propose for public comment amendments to Rule 105 of Regulation M, which addresses short sales prior to a public offering, to eliminate the shelf offering exception and to address transactions designed to evade the Rule.

#### *Commission Guidance on Rule 3b-3 and Married Put Transactions*

Finally, the Commission will also consider whether to publish simultaneously an interpretive release providing all market participants with guidance regarding the use of married put transactions when aggregating positions under Rule 3b-3 for determining compliance with Rule 10a-1 and Rule 105 of Regulation M.

For further information, please contact Kevin Campion or Greg Dumark at (202) 942-0772.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.