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December 27, 1995

Jack W. Murphy, Esq.
Associate Director (Chief Counsel)
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

ACT ICA
SECTION 3(c)(1)
RULE —
PUBLIC AVAILABILITY Dec. 28 1995

Re: The Standish, Ayer & Wood, Inc.
Stable Value Group Trust

Dear Mr. Murphy:

On behalf of our client, Standish, Ayer & Wood, Inc. ("Standish"), we respectfully request that the staff of the Division of Investment Management concur with our interpretation of Section 3(c)(1) under the Investment Company Act of 1940, as amended (the "1940 Act"), as it applies to the proposed activities described below.

Facts

The Standish, Ayer & Wood, Inc. Stable Value Group Trust (the "Trust") is being established by Standish and State Street Bank and Trust Company ("State Street") as a collective investment vehicle for tax-qualified pension and profit-sharing trusts and certain governmental retirement plans. The Trust, which will be organized as a so-called "group trust," will be tax exempt by virtue of satisfying the requirements of Revenue Ruling 81-100. Standish, which is registered as an investment adviser under the Investment Advisers Act of 1940, as amended, will serve as the Trust's investment manager, and State Street will serve as the Trust's directed Trustee.

It is expected that, pursuant to the Trust's Agreement of Trust, one or more separate investment funds, each with its own investment objectives and policies, may be established

from time to time by State Street at the direction of Standish.[1] The initial investment fund, Group Trust Fund I, will seek to achieve a high level of current income, consistent with preserving principal, and secondarily will seek capital appreciation when market factors such as declining interest rates indicate that capital appreciation may be available without significant risk to principal. Group Trust Fund I will seek to achieve its investment objective primarily through investing in a diversified portfolio of U.S. government and agency securities and AAA-rated securities of private issuers. Standish will serve as Group Trust Fund I's investment adviser, and State Street or another entity will serve as Group Trust Fund I's directed Trustee.

Group Trust Fund I is designed to serve as a "synthetic" Guaranteed Investment Contract. Accordingly, prior to participating in Group Trust Fund I, a fiduciary of each plan or trust investing in Group Trust Fund I (a "Participating Trust") must enter into a guaranteed investment contract (the "Contract") issued on behalf of the Participating Trust by a designated contract provider. Although the terms of each Contract may vary as a result of negotiations between the contract provider and the Participating Trust, each Contract's "book value" guarantee will provide that the contract provider, subject to certain conditions, will pay to such Participating Trust, upon certain redemptions of units in Group Trust Fund I, a pro-rated share of the amount withdrawn based on the difference between the value of such Participating Trust's "structured investment account" and the value of its units in Group Trust Fund I, but only to the extent the value of such structured investment account exceeds the value of such units.[2] However, if the value of the Participating Trust's units in Group Trust Fund I exceeds the value of its structured investment account, then upon certain redemptions the Participating Trust will be required to pay to the contract provider as additional premiums a similar pro-rated amount.

It is intended that units in Group Trust Fund I will be offered either in compliance with Rule 506 under the Securities Act of 1933, as amended (the "1933 Act"), or in such other manner as will not involve a "public offering" within the meaning of Section 3(c)(1) of the 1940 Act or Section 4(2) of the 1933 Act. It is expected that some, if not all, of the

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[1] Standish intends to treat each such investment fund as a separate issuer for purposes of Section 3(c)(1) of the 1940 Act.

[2] The value of a Participating Trust's structured investment account will initially equal the amount of cash invested in Group Trust Fund I and thereafter will be adjusted based on accrued interest (calculated by reference to a formula contained in the Contract) and other factors, including withdrawals from or additional investments in Group Trust Fund I and any increase or decrease in the premium owed to the contract provider.

Participating Trusts will be participant-directed defined contribution plans ("self-directed plans"). Standish and State Street will accept self-directed plans as investors in Group Trust Fund I only under very limited circumstances where it can be clearly established that a plan fiduciary -- and not plan participants -- actually decides "whether or how much to invest" in Group Trust Fund I, and, thus, only under circumstances where plan participants will not be deemed, under the staff's test set forth in The PanAgora Group Trust no-action letter (which is discussed in greater detail below), to be the beneficial owners of units in Group Trust Fund I. Accordingly, Standish has developed the following eligibility criteria and conditions for self-directed plans seeking to invest in Group Trust Fund I.

- First, the investment in Group Trust Fund I must be made on behalf of an existing separate and distinct investment fund (a "generic investment alternative") serving as a funding medium for a Participating Trust.[3]

- Second, the decision to invest assets of the generic investment alternative in Group Trust Fund I, both initially and subsequent to the initial investment, and to withdraw assets from Group Trust Fund I, must be made by a fiduciary of the Participating Trust acting in the exercise of its sole discretion to make such investment decisions. Such decisions must not be made pursuant to the direction of or upon consultation with any participant in the Participating Trust, nor may anyone acting on behalf of the plan sponsor, the plan or such fiduciary seek the views of, or poll, plan participants as to whether units in Group Trust Fund I would be a desirable investment for assets of the generic investment alternative.

- Third, the generic investment alternative, immediately following each purchase of units in Group Trust Fund I, must have at least 50% of its assets invested in securities or other property other than units in Group Trust Fund I.

- Fourth, no representation may be made to participants in the Participating Trust that any specific portion of their contributions to or account balances under the Participating Trust, or any specific portion of the relevant generic investment alternative, will be invested in Group Trust Fund I.

- Finally, each Participating Trust will agree that any information delivered to participants that mentions the generic investment alternative's investment in

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[3] Such generic investment alternative will typically have its own investment objective, such as stable value, income or growth.

> Group Trust Fund I will be accompanied by a disclaimer to the effect that: "No assurances can be given that the [generic investment alternative] will continue to invest its assets, or the same portion of its assets, in Group Trust Fund I."

By signing the Adoption Agreement required in connection with an investment in the Trust, each Participating Trust will represent and warrant that, at the time of each investment in Group Trust Fund I, it meets the applicable eligibility criteria and conditions established by Standish. Each Participating Trust will agree to maintain compliance with such criteria and continue to satisfy such conditions for so long as the generic investment alternative invests in Group Trust Fund I. Standish will from time to time seek confirmation from each Participating Trust that it continues to comply with such criteria and satisfy such conditions and, pursuant to the terms of the Agreement of Trust establishing the Trust, Standish will have the ability to involuntarily redeem any Participating Trust that fails to meet the foregoing criteria, satisfy the foregoing conditions or cooperate with Standish's efforts to monitor compliance with such criteria and conditions.

Analysis

Section 3(c)(1) of the 1940 Act provides in relevant part that the term "investment company" shall not include "any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which does not presently propose to make a public offering of its securities." In The PanAgora Group Trust no-action letter (April 29, 1994), the staff of the Division of Investment Management stated that it would consider "a defined contribution plan participant who decides whether or how much to invest in a private investment company to be a beneficial owner of the company's securities." (Emphasis added.) In the subsequent Latham & Watkins no-action letter (December 28, 1994), the staff, in discussing the scope of the PanAgora letter, stated that "[w]e might reach a different conclusion under different circumstances." For the reasons discussed below, we believe that the proposed activities of the Trust and Group Trust Fund I are clearly distinguishable from PanAgora as contemplated by Latham & Watkins.

As discussed above, Standish will impose eligibility standards on self-directed plans that seek to invest in Group Trust Fund I which will assure that Group Trust Fund I will not be a mere device for facilitating individual investment decisions by plan participants. A separate plan fiduciary -- and not plan participants -- will determine whether and how much of the assets of a separate, pre-existing generic investment alternative to invest in Group Trust Fund I. The plan fiduciary will have represented and agreed that, immediately following each purchase of units in Group Trust Fund I by the generic investment alternative, the generic investment alternative will have at least 50% of its assets invested in securities or other property other than units in Group Trust Fund I. Unlike the facts presented in PanAgora,

Group Trust Fund I will not be promoted to plan participants, or otherwise held out to them in any manner, as an investment choice under their plan. The plan fiduciary will have represented that it has not sought and will not seek the views of plan participants and that it has not polled and will not poll them as to whether Group Trust Fund I would be a desirable investment for assets of the generic investment alternative. The plan fiduciary will also have represented that it has not consulted with or taken direction from, nor will it consult with or take direction from, plan participants in connection with any investment of assets in Group Trust Fund I. In addition, the plan fiduciary will have agreed to include a disclaimer in all communications to plan participants that mention the generic investment alternative's investment in Group Trust Fund I to the effect that there can be no assurances that the generic investment alternative will continue to invest its assets, or the same portion of its assets, in Group Trust Fund I. The cumulative effect of these factors will assure that investment decisions with respect to Group Trust Fund I will, in fact, be made by the plan fiduciary and not by the plan participants.

Furthermore, there simply will be no reasonable basis for participants to equate the generic investment alternative with Group Trust Fund I, nor an investment in the generic investment alternative with an investment in Group Trust Fund I. The fact that units in Group Trust Fund I are as of any given time one of the investments of the generic investment alternative will not constitute a representation that such units will continue to be so held or that additional contributions to the generic investment alternative will be invested on a pro-rated basis in additional amounts of such units and the other investments held by such generic investment alternative. Also, the plan fiduciary's possession of the sole authority to alter the amount of the generic investment alternative's assets invested in Group Trust Fund I, including the ability to completely withdraw the investment from Group Trust Fund I, means that no participant can be assured that amounts allocated to a generic investment alternative that currently invests in Group Trust Fund I or, for that matter, in any other private or public investment company will continue to be invested in such entity in the future.[4] Consequently, the circumstances under which the assets of self-directed plans may be invested in Group Trust Fund I are clearly distinguishable from the circumstances in PanAgora, where the private investment trust (or the separate investment funds created under the private investment trust) would be identified as an available investment choice for such participants. As described

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[4] As noted above, two of the conditions which will be imposed on a self-directed plan that wishes to invest in Group Trust Fund I are that no representation can be made to participants that any portion of their contributions or account balances will be invested in Group Trust Fund I and that any communications to plan participants mentioning the generic investment alternative's investment in Group Trust Fund I will include a disclaimer as to any continued investment in Group Trust Fund I.

above, the plan participants simply are not afforded the opportunity to make any investment decision with respect to units in Group Trust Fund I.

We believe that there are substantial public policy reasons in favor of this interpretation of Section 3(c)(1). Recently, the number of employee benefit plans that permit participant direction has grown substantially. This trend is likely to continue for the foreseeable future. Unless the staff makes it clear that the scope of the PanAgora letter does not prohibit the circumstances described above, private investment companies will be excluded from participating in this market to any significant degree. From a public policy perspective, this result would be unfortunate for a number of reasons.

Group trusts, which provide a collective investment vehicle for tax-qualified plans, including plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provide vehicles the assets of which are considered "plan assets" and the investment managers of which acknowledge that they serve as ERISA "fiduciaries." Consequently, plan trustees may prefer these vehicles to other types of collective investment vehicles (such as mutual funds) due to the fact that they must be operated subject to the strict fiduciary standards and prohibited transaction provisions of ERISA.

Group trusts have grown to the point where such trusts constitute a significant portion of all available collective investment vehicles. Such trusts exist in substantial numbers and represent significant assets. They provide pension plans with additional investment choices which may be preferable to other investment alternatives for a variety of reasons. In many cases, a group trust may be the only form of collective investment fund managed by a particular investment manager and therefore may be the only way for a smaller plan, or a plan with only a limited amount of assets available for investment, to obtain the benefits of management by such investment manager. Often, a plan is able to obtain the expertise and skill of a particular manager through a group trust managed by that manager without having to commit the amounts normally required for the establishment of a stand-alone account. For example, an investment manager may require a minimum stand-alone account size of $20 million, but accept a minimum investment in a group trust sponsored by it of $2 million. Smaller plans benefit in this way, as do plans seeking to obtain the benefits of the investment styles and strategies of several investment managers. Many established group trusts are of substantial size (*e.g.*, $100 million or more) and are, therefore, able to provide plans investing in them with a more diversified investment than could be achieved through establishment of a reasonably sized stand-alone account. In the case of an index investment, a plan could achieve better replication of the index through participation in a group trust with substantial assets than by establishing its own smaller stand-alone index account. To deprive self-directed plans of these vehicles would significantly reduce the investment options available to such plans and, in many cases, deprive them of more diversified and less expensive alternatives.

Request

We respectfully request your concurrence in our view that, under the circumstances described above, a self-directed plan -- and not the participants thereof -- would be deemed to be the beneficial owner of units in Group Trust Fund I for purposes of Section 3(c)(1) of the 1940 Act, assuming that the look-through provisions of Section 3(c)(1)(A) do not apply.

Should you need any further information, please do not hesitate to contact the undersigned at (617) 951-7400.

Very truly yours,

Bryan Chegwidden

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DEC 28 1995

Our Ref. No. 95-423-CC
The Standish, Ayer & Wood, Inc. Stable Value Group Trust
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter of December 27, 1995 requests assurance that the staff would not recommend enforcement action to the Commission if, for purposes of section 3(c)(1) of the Investment Company Act of 1940, a participant-directed defined contribution plan that invests a portion of its assets in a separate investment fund (the "Fund") of The Standish, Ayer & Wood, Inc. Stable Value Group Trust ("Group Trust") is treated as a single beneficial owner of the investment fund under the circumstances described below.

You state that the Group Trust will be a collective investment vehicle for tax-qualified retirement and profit-sharing plans, including participant-directed defined contribution plans. The Group Trust will consist of the Fund and any other investment funds that may in the future be created at the direction of Standish, Ayer & Wood, Inc. ("Standish"), the Group Trust's investment manager. Each separate investment fund will have its own investment objectives and policies and will be treated as a separate issuer for purposes of section 3(c)(1).

You represent that Standish has developed certain criteria governing the investment of assets in the Fund by a participant-directed defined contribution plan (a "Participating Plan" or "Plan"), including the following:

- A Plan's investment in the Fund will be made with assets directed by Plan participants to an account with an identified generic investment objective (a "generic investment option").

- The decision to invest assets of a generic investment option in the Fund (both initially and subsequent to the initial investment), and to withdraw assets from the Fund, will be made solely by a Plan fiduciary, without direction from or consultation with any Plan participant.

- Immediately following each purchase of Fund units by a generic investment option, at least 50% of the option's assets will consist of securities or property other than units of the Fund.

- No representation will be made to Plan participants that any specific portion of their contributions to or account balances under the Plan, or any specific portion of the relevant generic investment option, will be invested in the Fund. If a Plan delivers any information to participants that mentions an investment in the Fund, it will be

accompanied by a disclaimer to the effect that no assurances can be given that the generic investment option will continue to invest its assets, or the same portion of its assets, in the Fund.

You represent that, before accepting a Plan as an investor in the Fund, Standish will require the Plan to represent and warrant that it will comply with the foregoing eligibility criteria for as long as the Plan invests in the Fund. Standish periodically will monitor a Participating Plan's compliance with these criteria and will have the ability, without the consent of the Plan, to redeem the Plan's interest in the Fund if the Plan is not in compliance or fails to cooperate with Standish's efforts to monitor compliance.

Section 3(c)(1) of the Investment Company Act excludes from the definition of investment company any issuer that is not making and does not propose to make a public offering and whose outstanding securities (other than short-term paper) are beneficially owned by not more than 100 persons. Generally, beneficial ownership of a 3(c)(1) issuer by a "company"[1] (a term that includes an employee benefit plan) is deemed to be beneficial ownership by a single person.[2] In The PanAgora Group Trust (pub. avail. Apr. 29, 1994) ("PanAgora"), the staff concluded that, for purposes of determining compliance with the 100-person limit of section 3(c)(1), each participant in a participant-directed defined contribution plan who allocates a portion of his or her account to a 3(c)(1) issuer should be treated as a beneficial owner of that issuer's securities. PanAgora was based on the staff's view that the securityholders of a "company" that invests in a 3(c)(1) issuer should be deemed to be beneficial owners of the issuer's securities if the company is managed to facilitate its securityholders' individual decisions to invest in the issuer.[3]

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[1] The term "company" is defined in section 2(a)(8) of the Investment Company Act to mean any corporation, partnership, association, joint-stock company, trust, fund, or organized group of persons whether incorporated or not.

[2] An exception to the general rule is found in the attribution provisions of section 3(c)(1)(A). Your letter assumes that those provisions do not apply.

[3] See, e.g., WR Investment Partners (pub. avail. Apr. 15, 1992) (the limited partners of a partnership were the beneficial owners of the partnership's interest in a 3(c)(1) entity because the general partner, which made all the investment decisions for the partnership, would consult with the limited partners about their individual investment objectives and vary, from investment

(continued...)

The eligibility criteria and other representations set out in your letter and described above are designed to ensure that Participating Plans will not be managed to facilitate their participants' individual decisions to invest in the Fund. In this regard, we note particularly your representations that: a Plan participant's discretion will be limited to allocating his or her account among a number of generic investment options; the decision to invest in the Fund, and the amount of assets invested, will be solely within the discretion of a Plan fiduciary; and immediately following any purchase of Fund units by a Participating Plan, less than 50% of the assets of a generic investment option will be invested in the Fund.[4]

On the basis of the foregoing, we would not recommend enforcement action to the Commission if, for purposes of section 3(c)(1), a Plan is deemed to be a single beneficial owner of the

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[3](...continued)
to investment, each limited partner's percentage share of profits and losses based on individual circumstances); Six Pack (pub. avail. Nov. 13, 1989) (the partners of a general partnership were the beneficial owners of the partnership's investment in a 3(c)(1) entity because the partnership permitted each partner to determine the amount of his or her contribution to each particular investment, based on his or her individual investment objectives); Tyler Capital Fund, L.P./South Market Capital (pub. avail. Sept. 28, 1987) (the partners of a general partnership were the beneficial owners of the partnership's investment in a 3(c)(1) entity because the partnership created a separate sub-account for each new investment it made and permitted each partner to contribute on an investment-by-investment basis).

[4] The 50% representation is intended to ensure that a Plan participant's decision to allocate assets to a generic investment option is not the substantial equivalent of a decision to invest in the Fund. By incorporating this representation in its response, the staff does not suggest that a higher percentage investment necessarily would mean that a Plan's participants must be treated as the beneficial owners of an underlying 3(c)(1) issuer's securities. Nor does the staff foreclose the possibility that different facts from those stated here might justify treating a Plan as a single beneficial owner. The staff does not intend to respond to no-action requests, however, that involve a generic investment option seeking to invest more than 50% of its assets in a 3(c)(1) issuer if the request does not otherwise differ materially from the facts described in the incoming letter.

Fund's units. This position is based on the facts and representations in your letter, and you should note that different facts and circumstances might require a different result.

Barry A. Mendelson

Barry A. Mendelson
Senior Counsel