

Letter of Comment No: 9
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September 2, 2004

Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

**Re: Proposed FSP FAS 140-b - Application of EITF Issue No. 85-24,
“Distribution Fees by Distributors of Mutual Funds That Do Not Have a
Front-End Sales Charge,” When Future Distribution Fees Are Sold to
Unrelated Third Parties.**

Dear Sir or Madam:

ING Funds Distributor, LLC (“IFD”) participates in transactions whereby IFD sells the rights to receive future 12b-1 distribution fees and contingent deferred sales charges (the “Fees”) to a third party. IFD treats these transactions as sales for financial reporting purposes. We believe that the sale of the right to receive these Fees to the third party, along with the benefits and risks that accompany the rights to receive such Fees, constitute sale transactions and should be recorded as such.

We understand your view to be, among other things, that since funds do not record the Fees as a liability and distributors do not record the Fees as a receivable, these types of transactions would be subject to EITF 88-18, and would therefore be treated as debt or deferred income. In response, following are two positions we believe provide strong support for reflecting these transactions as sales for financial reporting purposes. Both positions result in the financial reporting reflecting the true economic substance of the sale transaction.

1. The Fees are a “financial asset” under Statement of Financial Accounting Standards No. 140 and the sale of the Fees qualifies for sale treatment under FASB 140.

In our view, the distributor is selling a “financial asset” to the purchaser. FASB 140 reiterates the definition of a “financial asset” from FASB 107. FASB 107 defines a “financial instrument” as:

Cash, evidence of an ownership interest in an entity, or a contract that both:

- a. Imposes on one entity a contractual obligation
 - (1) to deliver cash or another financial instrument to a second entity
 - or
 - (2) to exchange other financial instruments on potentially unfavorable terms with the second entity

- b. Conveys to that second entity a contractual right
 - (1) to receive cash or another financial instrument from the first entity
 - or
 - (2) to exchange other financial instruments on potentially favorable terms with the first entity [footnotes omitted].

It is important to note that in FASB 107, the term “financial instrument” has the same definition as a “financial asset” in FASB 140. Note 145 to FASB 140 provides that “financial assets and liabilities are assets and liabilities that qualify as financial instruments.” We believe that the cash flow that distributors sell to purchasers is a “financial asset” as defined above, as it consists of the contractual right to receive cash *i.e.*, Fees from the funds and its shareholders.

We do not agree with the premise that a distributor may not treat the Fees as financial assets because it did not record them as a receivable on its books. FASB 107 contemplates that a contractual right to receive cash may not necessarily be recognized as an asset in the financial statements. Footnote 3 of FASB 107 states that:

Contractual rights encompass both those that are conditioned on the occurrence of a specified event and those that are not. All contractual rights that are financial instruments meet the definition of an “asset” set forth in Concepts Statement 6, although some may not be recognized as assets in financial statements -- may be “off-balance-sheet” -- because they fail to meet some other criterion for recognition. *** [Emphasis added]

Accordingly, the fact that the distributor does not record the Fees as a receivable on its financial statements does not preclude the distributor from considering the Fees to

be a financial asset.¹ Moreover, the financial markets treat the Fees as financial assets and rating agencies assign ratings to securitizations, which are backed by the cash flow from distribution fees and contingent deferred sales charges.

Based on our view that the Fees are “financial assets,” we further believe that the sale of the Fees should be accounted for as a sale under FASB 140. FASB 140 provides that:

A transfer of financial assets in which the transferor surrenders control over those assets is accounted for as a sale to the extent that consideration other than beneficial interests in the transferred assets is received in exchange. The transferor has surrendered control over transferred assets *if and only if all of the following conditions are met:*

- a. The transferred assets have been isolated from the transferor—put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy or other receivership.
- b. Each transferee (or, if the transferee is a qualifying special-purpose entity (SPE), each holder of its beneficial interests) has the right to pledge or exchange the assets (or beneficial interests) it received, and no condition both constrains the transferee (or holder) from taking advantage of its right to pledge or exchange and provides more than a trivial benefit to the transferor.
- c. The transferor does not maintain effective control over the transferred assets through either:
 - (1) an agreement that both entitles and obligates the transferor to repurchase or redeem them before their maturity or
 - (2) the ability to unilaterally cause the holder to return specific assets, other than through a cleanup call.

We believe that the transactions in question meet all of the criteria above. In its purchase and sale agreement with the purchaser, the distributor surrenders “control” over the Fees when it sell them to the purchaser. Outside law firms provide legal

¹ Incidentally, the distributor also has an asset on its books that, in essence, represents the financial asset that it is selling to the purchaser -- it is often called “deferred acquisition costs” in the financial statements of the distributor.

opinions in connection with these sales concluding, in effect, that the Fees would not be property of the distributor's estate if it were to file for bankruptcy. The purchaser has the right to pledge, transfer and exchange the Fees (and has in fact done so, through securitization transactions). There is no agreement entitling or obligating the distributor to repurchase or redeem the Fees prior to their maturity, or to cause the Fees to be returned to the distributor.

Based on the above, we are confident that the distributor has sold a financial asset and that it is appropriate to reflect the sale of the Fees as a sale for financial reporting purposes.

2. If the FASB determines that the Fees are not subject to FASB 140, the sale thereof nonetheless qualifies for off balance sheet treatment after taking into consideration EITF 85-24 and EITF 88-18.

EITF 88-18 creates a rebuttable presumption of debt treatment for proceeds from sales of future revenues if any one of the following six criteria is present:

- the form of the transaction is debt;
- the enterprise has significant continuing involvement in the generation of cash flow;
- the transaction is cancelable;
- the investor's rate of return is limited; income or revenue variations have only a trifling effect on investor's rate of return; and
- there is recourse to the enterprise for payments due the investor.

In a typical transaction involving the sale of the right to receive Fees, none of these criteria is present. Accordingly, the transaction would be classified under EITF 88-18 as deferred income.

Furthermore, EITF 85-24 requires the distributor to recognize revenue when it receives the Fees, along with the amortization of the deferred incremental direct costs (*i.e.*, the distributor's deferred acquisition costs). Accordingly, the distributor would recognize net deferred income at the time of receipt of the Fees.

In order to have sale treatment, all steps toward recognizing revenue must be completed. In the transactions in question, when the purchaser pays the distributor for the Fees, at that point the distributor realizes all cash flows that it expects to receive from the purchaser and at the same time recognizes all the revenues, related deferred acquisition costs, and deferred income. Since the sale agreement directs all

future cash flows from the funds to the purchaser, there are no future revenues for the distributor to recognize and accordingly, the sale is complete. The financial statements should therefore reflect the full recognition of revenue and expense at that time.

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In summary, we believe that the sale of Fees to a third party constitutes a sale from an economic, legal and business point of view and that the financial reporting of such transactions should reflect the substance of such transactions, that is, using sale treatment. The accounting literature supports the sale treatment: FASB 140 is supportive from a "sale of a financial asset" point of view and EITF 88-18 and EITF 85-24 support the treatment because all expected cash flows are received at the time of the sale transaction and the revenues and expenses should be recognized at that time.

Furthermore, treatment of these types of transactions as debt does not clearly reflect the transactions to the reader of the financial statements. There are no ongoing receipts, payments, or risks for the distributor in these transactions. Sale treatment is the more accurate reflection.

Thank you for your consideration.

Sincerely,

Michael J. Roland
Executive Vice President
Chief Financial Officer
ING Funds