

ACT ICA
SECTION 17(f)
RULE 17f-5

PUBLIC
AVAILABILITY 5/24/99

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

May 24, 1999
Our Ref. No. 99-130
ING Bank N.V., *et al.*
File No. 132-3

In your letter dated May 20, 1999, you request our assurance that we would not recommend enforcement action to the Commission under Section 17(f) of the Investment Company Act of 1940 (the "Act") or Rule 17f-5 thereunder if any investment company registered under the Act ("Fund"), or its custodian or subcustodian, places the Fund's investments in the custody of special purpose corporations ("Special Purpose Corporations") established by ING Bank N.V. ("ING Bank").

Background

ING Bank is a banking institution organized under the laws of The Netherlands and is regulated by the Dutch Central Bank ("DNB"), an agency of the Dutch government. You state that ING Bank offers custodial and subcustodial services to Funds and their custodians and subcustodians. You state that, under the laws of The Netherlands, equity and debt securities, options, warrants and other derivative instruments that are held in custody by a bank constitute a part of the bank's assets and fall within the bank's bankruptcy estate in the event of its insolvency. To protect the rights of custodial clients with respect to these types of investments, The Netherlands banking community established systems for their safekeeping called the "Vabef System" ("Vabef I") and the "Vabef II System" ("Vabef II"), which facilitate the organization, by participating banks, of bankruptcy-remote special purpose corporations to hold investments for safekeeping.¹

You state that ING Bank organized Effectenbewaarbedrijf ING Bank N.V. ("EIB"), a Vabef I corporation, and ING Bank Global Custody N.V. ("ING Global Custody"), a Vabef II corporation, both of which are Special Purpose Corporations.² The Special Purpose Corporations engage in no activities other than the holding of

¹ You represent that the investments that are held by the Special Purpose Corporations are protected under the laws of The Netherlands from the risk of ING Bank becoming insolvent, and are free from recourse by ING Bank's creditors.

² EIB holds for safekeeping bearer securities that are held in The Netherlands. ING Global Custody holds for safekeeping: (1) registered securities; and (2) on its books, bearer securities that are held outside of The Netherlands by a subcustodian. Telephone conversation between Kathy Kresch Ingber of Mayer, Brown & Platt and Alison M. Fuller of the staff on May 21, 1999.

investments for ING Bank. Their sole purpose is to serve, in effect, as vaults for the safekeeping of investments.

One hundred percent of the shares of each Special Purpose Corporation are owned by an administrative office. Each administrative office is a separate legal entity, created by ING Bank, which functions as the governing arm of its related Special Purpose Corporation.³ ING Bank manages the day-to-day operations of each Special Purpose Corporation by serving as its managing director and as a member of the board of directors of its administrative office.⁴

You represent that, in practice, each Special Purpose Corporation functions as an operating division of ING Bank. You state that ING Bank contractually is obligated to provide each Special Purpose Corporation with office space, equipment and personnel and to reimburse each Special Purpose Corporation for losses that it may incur in any year. You represent that, as a result of the functional integration of each Special Purpose Corporation with ING Bank, The Netherlands tax authorities treat ING Bank and each Special Purpose Corporation as a "fiscal unity" for both value-added tax and corporate income tax purposes.

You state that, as an operational matter, the Special Purpose Corporations are transparent to ING Bank's custodial clients, and these clients have contact only with ING Bank. You state that ING Bank performs all administrative services to implement the custody of investments, including, but not limited to, collecting interest and dividend payments and executing orders for the purchase and sale of investments.

You represent that ING Bank guarantees the performance by each Special Purpose Corporation under the terms of the custodial agreements among ING Bank, the relevant Special Purpose Corporation, and the custodial clients. You state that this guarantee is required by rules jointly adopted by ING Bank and each Special Purpose Corporation, which are incorporated into and annexed to each custody agreement. You represent that the guarantee provides the custodial client with a claim against ING Bank in the event of a loss for which the Special Purpose Corporation could be held liable. If a deficiency

³ Upon the creation of each Special Purpose Corporation, ING Bank transferred legal ownership of the shares of each Special Purpose Corporation to its respective administrative office in exchange for non-convertible depositary receipts with respect to the shares of the Special Purpose Corporation. You state that the non-convertible depositary receipts evidence ING Bank's one hundred percent economic ownership interest in each Special Purpose Corporation. A one hundred percent legal ownership interest in each Special Purpose Corporation is held by its administrative office.

⁴ As a voting member of the boards of directors of the administrative offices, ING Bank participates in the oversight of each Special Purpose Corporation. The boards of directors of the administrative offices meet annually.

occurs for which neither the relevant Special Purpose Corporation nor ING Bank could be held liable, you state that such deficiency would be apportioned *pro rata* among those clients of ING Bank having a claim.

You represent that each Special Purpose Corporation is regulated, in effect, as though it were a division of ING Bank. You represent that the DNB effectively exercises regulatory authority over the Special Purpose Corporations as a result of ING Bank's representation on the board of directors of each administrative office that oversees the Special Purpose Corporations.⁵ You state that the DNB monitors the Special Purpose Corporations through its review of ING Bank's monthly balance sheets and annual accounts reports that ING Bank submits to the DNB. You state that the monthly balance sheets include an entry reflecting the value of ING Bank's qualified participation in each Special Purpose Corporation, and ING Bank's annual accounts report is accompanied by a report describing each qualified participation. The report must include, among other things, a brief description of the Special Purpose Corporations' business operations.

Discussion

Rule 17f-5 under the Act provides that a Fund may place investments for which the primary market is outside of the United States in the care of an Eligible Foreign Custodian. An Eligible Foreign Custodian is defined in Rule 17f-5(a) to include a Qualified Foreign Bank, which is defined as "a banking institution or trust company, incorporated or organized under the laws of a country other than the United States, that is regulated as such by the country's government or an agency of the country's government."⁶ You state that, while ING Bank is a Qualified Foreign Bank and therefore an Eligible Foreign Custodian, the Special Purpose Corporations are not banking institutions and are regulated only indirectly by the DNB. The Special Purpose Corporations do not, therefore, qualify as Eligible Foreign Custodians under Rule 17f-5.

You argue that the close operational relationship between ING Bank and each Special Purpose Corporation effectively renders the safekeeping of investments by the

⁵ You state that ING Bank's ability to exercise voting power in each Special Purpose Corporation (through its representation on the board of directors of each Special Purpose Corporation's administrative office) is considered a "qualified participation" requiring a "declaration of no-objection" from the DNB. You state that the DNB is authorized to impose restrictions on, and attach conditions to, the granting of a declaration of no-objection, and to revoke such a declaration, if it believes that the Dutch banking industry, or ING Bank independently, would be adversely affected by the participation or that the participation would have a detrimental effect on the credit system of The Netherlands.

⁶ Rule 17f-5(a)(4).

Special Purpose Corporations the safekeeping of investments by ING Bank itself. You state that, although the Special Purpose Corporations are incorporated separately under the laws of The Netherlands, they effectively function as operating divisions of ING Bank. You state that, under the terms of any custodial agreement entered into among a Fund, ING Bank, and a Special Purpose Corporation (a "custodial agreement"), the Special Purpose Corporation would provide safekeeping services only. You represent that under the custodial agreements ING Bank would guarantee the performance of each Special Purpose Corporation's safekeeping function. You also represent that ING Bank would assume liability under the custodial agreement for any loss, damage, cost, expense, liability or claim arising out of, or in connection with, the performance by a Special Purpose Corporation of its responsibilities under the custodial agreement to the same extent as if ING Bank had been required to provide the safekeeping services itself. You also state that ING Bank is acting through the Special Purpose Corporations in order to provide greater protection for its custodial clients, given the effect of the bankruptcy laws of The Netherlands.

In adopting Section 17(f) of the Act, Congress intended Fund assets "to be kept by financially secure entities that have sufficient safeguards against misappropriation."⁷ In addition, the wording of Section 17(f) indicates that it was intended to ensure that the custodial arrangements that are available to a Fund provide reasonable protections for the Fund's assets.⁸ You state that the use of the Special Purpose Corporations by ING Bank facilitates the safe custody of Fund investments in The Netherlands by protecting those investments from ING Bank's creditors in the event of ING Bank's insolvency. You argue that the guarantee by ING Bank of a Special Purpose Corporation's performance of its safekeeping function would ensure that Fund investments are effectively held by a financially secure entity.

To qualify as an Eligible Foreign Custodian under Rule 17f-5, a foreign banking institution must be regulated as such by a foreign government or an agency of thereof.⁹ You represent that the Special Purpose Corporations effectively are regulated by the DNB through the DNB's regulation of ING Bank's management and operation of each Special Purpose Corporation.

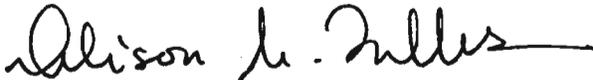
⁷ Custody of Investment Company Assets Outside the United States, Investment Company Act Release No. 21259 (July 27, 1995), *citing, Investment Trusts and Investment Companies: Hearings on S.3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 264 (1940). *Cf.* 10 SEC ANN. REP. 169 (1944) (discussing Section 17(f) and its protections against theft and embezzlement by affiliated persons of investment companies).

⁸ See, e.g., Section 17(f)(1), which requires banks that hold investment company assets to have \$500,000 of capital and be subject to government regulation.

⁹ See Rule 17f-5(a)(4).

Based on the facts and representations in your letter, we would not recommend enforcement action to the Commission under Section 17(f) of the Act or Rule 17f-5 thereunder if any Fund, or its custodian or subcustodian, places the Fund's investments in the custody of a Special Purpose Corporation established by ING Bank, provided that the Fund's foreign custody arrangements that involve the Special Purpose Corporation will comply with the provisions of Rule 17f-5 in all respects except that the Special Purpose Corporation may not be a Qualified Foreign Bank and, therefore, not an Eligible Foreign Custodian. Our response is based particularly on your representations that: (1) ING Bank is a Qualified Foreign Bank; (2) ING Bank manages the day-to-day operations of the Special Purpose Corporations; (3) ING Bank owns one hundred percent of the economic ownership interests of each Special Purpose Corporation; (4) ING Bank participates in the oversight of each Special Purpose Corporation as a voting member of the board of directors of each administrative office; (5) in practice, the Special Purpose Corporations function as operating divisions of ING Bank; (6) the Special Purpose Corporations engage in no activities other than the safekeeping of investments for custodial clients; and (7) ING Bank will guarantee, as described in your letter, the performance of each Special Purpose Corporation's safekeeping function.

You should note that different facts and circumstances may require a different conclusion. This response represents the views of the staff on enforcement action only, and does not purport to state any legal conclusion on the issue presented.



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May 20, 1999

Investment Company Act of 1940
Section 17(f) and Rule 17f-5

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Attn: Alison M. Fuller, Esq.

Re: ING Bank N.V., Effectenbewaarbedrijf ING Bank N.V.
and ING Bank Global Custody N.V.

Ladies and Gentlemen:

We are writing on behalf of ING Bank N.V. ("ING Bank"), Effectenbewaarbedrijf ING Bank N.V. ("EIB") and ING Bank Global Custody N.V. ("ING Global Custody") (each of EIB and ING Global Custody, a "Special Purpose Corporation"), requesting the staff of the Division of Investment Management (the "Staff") to confirm that it will not recommend enforcement action to the Securities and Exchange Commission (the "Commission") under Section 17(f) of the Investment Company Act of 1940, as amended (the "1940 Act"), or Rule 17f-5 thereunder, to the extent that any investment company registered under the 1940 Act, its custodian or subcustodian, places the investment company's investments in the custody of the Special Purpose Corporations established by ING Bank when neither of the Special Purpose Corporations qualifies as an Eligible Foreign Custodian under Rule 17f-5.

As described further herein, the Special Purpose Corporations are bankruptcy-remote entities formed for the protection of ING Bank's custodial clients, and the close operational relationship between ING Bank and each Special Purpose Corporation effectively renders the safekeeping of investments by the Special Purpose Corporations the safekeeping of investments by ING Bank itself.

Office of Chief Counsel
May 20, 1999
Page 2

I. Statement of Facts

A. ING Bank

ING Bank is a part of ING Groep N.V. ("ING Groep"), the largest financial services group in The Netherlands and one of the major financial institutions in Europe.^{1/} ING Bank operates in The Netherlands and in major financial centers and emerging markets throughout the world.^{2/} As a banking institution organized under the laws of The Netherlands, ING Bank is regulated in The Netherlands by the Dutch Central Bank (the "DNB"), an agency of the Dutch government.^{3/} ING Bank offers custody and subcustody services to registered investment companies, and their custodians and subcustodians, as one of the services it offers to investors and financial institutions worldwide.

B. The Law of The Netherlands and the Vabef Systems

Under the law of The Netherlands, equity and debt securities, options, warrants and other derivative instruments that are held in custody by a bank constitute a part of the bank's assets and fall within the bank's bankruptcy estate in the event of its insolvency. To protect the rights of custodial clients with respect to these types of investments, The Netherlands banking community established systems for their safekeeping called the "Vabef System" ("Vabef I") and the "Vabef II System" ("Vabef II") (collectively, the "Vabef Systems"), which facilitate the organization, by participating banks,^{4/} of bankruptcy-remote special purpose corporations to hold investments for safekeeping.^{5/} These investments held by the Special Purpose Corporations

^{1/} Shares of ING Groep are traded on the New York Stock Exchange. ING Groep was created as a result of the merger in 1991 between ING Bank (formerly NMB Postbank Groep N.V.) and Nationale-Nederlanden N.V., the largest insurance company in The Netherlands at that time. At December 31, 1998, ING Groep had combined shareholders' equity in excess of 64 billion Dutch guilders (approximately U.S. \$33.96 billion).

^{2/} ING Bank maintains approximately 126 branches in 52 countries. At December 31 1998, ING Bank had shareholders' equity in excess of 22 billion Dutch guilders (approximately U.S. \$11.67 billion).

^{3/} On February 1, 1999, the operation and management of the securities departments of banks in The Netherlands were also placed under the supervision of the Stichting Toezicht Effectenverkoor ("STE"), the Dutch equivalent of the Commission.

^{4/} The banks that participate in Vabef I and Vabef II include: ING Bank, ABN AMRO Bank N.V., MeesPierson N.V., Hollandsche Bank Unie N.V., Generale Bank Nederland N.V., and SNS Bank Nederland N.V.

^{5/} The Uniform Rules for the Custody of Securities adopted by each bank participating in Vabef I provide for the special purpose corporations organized under Vabef I to hold for safekeeping bearer securities held in The Netherlands. The Uniform Rules for the Custody of Securities adopted by each bank participating in Vabef II provide for the special purpose corporations organized under Vabef II to hold for safekeeping bearer securities held outside The Netherlands and registered securities. See note 9, *infra*.

Office of Chief Counsel

May 20, 1999

Page 3

are protected under the laws of The Netherlands from the risk of ING Bank becoming insolvent and are free from recourse by ING Bank's creditors.

C. The Special Purpose Corporations

ING Bank organized EIB under Vabef I and ING Global Custody under Vabef II, respectively. ING Bank manages the day-to-day operations of each of EIB and ING Global Custody by serving as its Managing Director and as a member of the Board of Directors of its administrative office. One hundred percent of the shares of each of the Special Purpose Corporations is owned by an administrative office.^{6/} The administrative offices' boards of directors legally govern their respective offices.^{7/} The Special Purpose Corporations engage in no activities other than the holding of investments for ING Bank.^{8/} Their sole function is to serve, in effect, as vaults for the safekeeping of investments.^{9/}

^{6/} The shares of EIB are held by the Stichting Administratiekantoor Vabef, the administrative office that oversees the operations of EIB, and the shares of ING Global Custody are held by the Stichting Administratiekantoor ING Global Custody N.V., the administrative office that oversees the operations of ING Global Custody. Each administrative office is a separate legal entity, created by ING Bank, which functions as the governing arm of its related Special Purpose Corporation. Upon the creation of each Special Purpose Corporation, ING Bank transferred legal ownership of the shares of EIB and ING Global Custody, respectively, to the Stichting Administratiekantoor Vabef and the Stichting Administratiekantoor ING Global Custody N.V. in exchange for non-convertible depository receipts with respect to the shares of the Special Purpose Corporation. The non-convertible depository receipts evidence ING Bank's one hundred percent economic ownership interest in each Special Purpose Corporation and a one hundred percent legal ownership interest in each Special Purpose Corporation is held by the Stichting Administratiekantoor Vabef and the Stichting Administratiekantoor ING Global Custody N.V. As a voting member of the Boards of Directors of the Stichting Administratiekantoor Vabef and the Stichting Administratiekantoor ING Global Custody N.V., ING Bank participates in the oversight of each Special Purpose Corporation.

The establishment of Vabef I and the Stichting Administratiekantoor Vabef was a joint effort of the six banks that participate in the Vabef I. *See, supra*, note 4. The same banks that participate in Vabef I participate in Vabef II. However, each participating bank has established its own Stichting Administratiekantoor to hold the shares and govern the operations of its Vabef II corporation. The Stichting Administratiekantoor established by ING Bank for ING Global Custody is the Stichting Administratiekantoor ING Bank Global Custody N.V.

^{7/} ING Bank has one representative on the four-member Board of Directors of the Stichting Administratiekantoor Vabef and two representatives on the three-member Board of Directors of the Stichting Administratiekantoor ING Bank Global Custody Group N.V. The Boards of Directors of the Stichting Administratiekantoor Vabef and the Stichting Administratiekantoor ING Bank Global Custody Group N.V. meet annually.

^{8/} Under their Articles of Association, the Special Purpose Corporations are prohibited from engaging in commercial transactions. Accordingly, The Special Purpose Corporations engage in no activities other than the safekeeping of investments for custodial clients of ING Bank.

^{9/} The Special Purpose Corporations are parties to the custodial agreements between ING Bank and its custodial clients. The investments held for safekeeping by each Special Purpose Corporation, other than bearer securities, are registered in the name of the relevant Special Purpose Corporation. Bearer securities located in The Netherlands are

Office of Chief Counsel

May 20, 1999

Page 4

Moreover, each Special Purpose Corporation is regulated, in effect, as though it were a division of ING Bank. The DNB, the government agency regulating ING Bank, effectively exercises regulatory authority over the Special Purpose Corporations as a result of ING Bank's representation on the Board of Directors of each administrative office that oversees the Special Purpose Corporations.^{10/} The DNB monitors the Special Purpose Corporations through its review of the monthly balance sheets and annual accounts reports that ING Bank submits to the DNB.^{11/}

As an operational matter, the Special Purpose Corporations are transparent to custodial clients of ING Bank. ING Bank performs all administrative services to implement the custody of investments, including the collection of interest and dividend payments and the execution of

held by EIB in EIB's account at ING Bank. Bearer securities located outside The Netherlands are held by ING Global Custody in ING Global Custody's account with a subcustodian appointed by ING Bank. Although the Special Purpose Corporations are empowered to exercise all rights, including voting rights, with respect to the securities held by them, the Special Purpose Corporations defer to the instructions of custodial clients concerning the voting of their shares.

^{10/} ING Bank's ability to exercise voting power in each Special Purpose Corporation, through its representation on the Board of Directors of the Stichting Administratiekantoor Vabef, and the Stichting Administratiekantoor ING Global Custody N.V., respectively, is considered a "qualified participation," requiring a "declaration of no-objection" from the DNB. Under the law of The Netherlands, a "qualified participation" is the ability by a bank to control more than five percent of the voting power in a company.

Banks in The Netherlands are prohibited from having a qualified participation absent a declaration of no-objection from the DNB. The DNB is authorized to impose restrictions on, or attach conditions to, the granting of a declaration of no-objection, and to revoke a declaration of no-objection, if it believes that the Dutch banking industry, or ING Bank independently, would be adversely affected by this participation or that this participation would have a detrimental effect on the credit system of The Netherlands.

^{11/} ING Bank's monthly balance sheets contain an entry reflecting the value of ING Bank's qualified participation in each Special Purpose Corporation, and ING Bank's annual accounts report is accompanied by a report describing each qualified participation. The report must include: a statement as to the size of ING Bank's qualified participation and any changes therein relative to the preceding annual report, the amount of the Special Purpose Corporation's issued capital, a brief description of the Special Purpose Corporation's business operations, the name of the formal owner of each qualified participation, a statement indicating that a qualified participation has been guaranteed by ING Bank, a statement indicating whether or not the qualified participations are consolidated in ING Bank's monthly balance sheet and the percentage of the issued capital of each Special Purpose Corporation that has not yet been paid up.

On February 1, 1999, the Special Purpose Corporations also became subject to regulation by the STE. It is not yet clear whether or how STE regulation will affect the management of the Special Purpose Corporations by ING Bank. *See, supra*, note 3.

Office of Chief Counsel
May 20, 1999
Page 5

orders for the purchase and sale of investments.^{12/} Custodial clients of ING Bank have contact only with ING Bank. Cash transfers are made to and from ING Bank. Client instructions concerning their investments are communicated to ING Bank, and ING Bank, in turn, relays the instructions to the Special Purpose Corporations. ING Bank also guarantees the performance by each Special Purpose Corporation under the terms of the custodial agreements among ING Bank, the relevant Special Purpose Corporation and custodial clients.^{13/}

In practice, each Special Purpose Corporation functions as an operating division of ING Bank. ING Bank is contractually obligated to provide each Special Purpose Corporation with office space, equipment and personnel and to reimburse each Special Purpose Corporation for losses it may incur in any year. As a result of the functional integration of each Special Purpose Corporation with ING Bank, The Netherlands tax authorities treat ING Bank and the Special Purpose Corporations as a "fiscal unity" for both value-added tax (VAT) and corporate income tax purposes.

D. The Proposed Custody Arrangements

ING Bank proposes that the Special Purpose Corporations hold for safekeeping the investments of investment companies registered under the 1940 Act, for which ING Bank acts as custodian, in accordance with a custodial agreement among ING Bank, the relevant Special Purpose Corporation, and the investment company, or its custodian or subcustodian. The custodial agreement would remain in effect at all times that the relevant Special Purpose Corporation does not technically meet all of the requirements of Rule 17f-5 under the 1940 Act.

Under the terms of the custodial agreement, a Special Purpose Corporation would provide safekeeping services only, and ING Bank would guarantee the performance of the Special Purpose Corporation's safekeeping function. ING Bank would assume liability under the agreement for any loss, damage, cost, expense, liability or claim arising out of, or in connection with, the performance by the Special Purpose Corporation of its responsibilities under the agreement to the same extent as if ING Bank had been required to provide the safekeeping services itself.

^{12/} Other administrative services performed by ING Bank include realizing subscription rights, obtaining new coupon or dividend sheets, effecting conversions, lodging securities and executing orders for the sale of investments. The term "lodging securities" refers to the process whereby ING Bank presents a client's securities to a company to verify that the client is entitled to attend and vote his or her shares at a meeting of the company's shareholders.

^{13/} This guarantee is required by rules jointly adopted by ING Bank and each Special Purpose Corporation, which are incorporated into the custodial agreements and annexed thereto. The guarantee provides the custodial client with a claim against ING Bank in the event of a loss for which the Special Purpose Corporation could be held liable. The guarantee also applies in the case of a bankruptcy or moratorium affecting the relevant Special Purpose Corporation, with respect to its obligations existing prior to the bankruptcy or moratorium. Any deficiency for which neither the relevant Special Purpose Corporation nor ING Bank could be held liable would be apportioned *pro rata* among the clients of ING Bank having a claim.

Office of Chief Counsel
May 20, 1999
Page 6

II. Legal Analysis

A. Section 17(f) and Rule 17f-5

Section 17(f) of the 1940 Act and the rules adopted by the Commission thereunder govern the safekeeping of registered investment company investments.^{14/} Congress intended Section 17(f) to ensure that the investments of registered investment companies would be held “by financially secure entities.”^{15/}

The Commission adopted Rule 17f-5 in 1984^{16/} to enable investment companies to “place and maintain in the care of an ‘Eligible Foreign Custodian’ any investments (including foreign currencies) for which the primary market is outside the United States.”^{17/} Rule 17f-5(a)(1) defines an “Eligible Foreign Custodian” as:

an entity that is incorporated or organized under the laws of a country other than the United States and that is:

- (i) A Qualified Foreign Bank or a majority-owned direct or indirect subsidiary of a U.S. bank or bank-holding company;

^{14/} Section 17(f) of the 1940 Act requires every registered investment company to “place and maintain its securities and similar investments in the custody of: (1) a bank or banks having the qualifications prescribed in paragraph (1) of Section 26(a) for the trustees of unit investment trusts, or (2) a company which is a member of a national securities exchange as defined in the Securities Exchange Act of 1934, . . . or (3) such registered company, but only in accordance with such rules and regulations or orders as the Commission may from time to time prescribe for the protection of investors . . . or in a system for the central handling of securities established by a national securities exchange or national securities association registered with the Commission under the Securities Exchange Act of 1934.” By restricting permissible custodians to the foregoing entities, Section 17(f) effectively limits investment company custodians to entities organized under the laws of the United States. 15 U.S.C. 80a-17(f).

Section 2(a)(5) of the 1940 Act defines a “bank” to include any “banking institution organized under the laws of the United States. 15 U.S.C. 80a-2(a)(5). Section 26(a)(1) of the 1940 Act, in relevant part, requires a bank, which serves as custodian or trustee for a registered unit investment trust, to “have at all times an aggregate capital, surplus, and undivided profits, of a specified minimum amount, which shall not be less than \$500,000.” 15 U.S.C. 80a-26(a)(1).

^{15/} “Custody of Investment Company Assets Outside the United States,” SEC Rel. No. IC-21259 (July 27, 1995), *citing*, Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. 264 (1940).

^{16/} “Exemption for Custody of Investment Company Securities Outside the United States,” SEC Rel. No. IC-14132 (September 7, 1984) (Final Rule).

^{17/} 17 C.F.R. 270.17f-5(c).

Office of Chief Counsel
May 20, 1999
Page 7

- (ii) A securities depository or clearing agency that acts as a system for the central handling of securities or equivalent book-entries in the country that is regulated by a foreign financial regulatory authority as defined under section 2(a)(50) of the Act [15 U.S.C. 80a-2(a)(50)]; or
- (iii) A securities depository or clearing agency that acts as a transnational system for the central handling of securities or equivalent book-entries.^{18/}

A "Qualified Foreign Bank" is defined by Rule 17f-5(a)(4) as "a banking institution or trust company, incorporated or organized under the laws of a country other than the United States, that is regulated as such by the country's government or an agency of the country's government."^{19/}

B. Status as an Eligible Foreign Custodian

ING Bank is a banking institution organized under the law of The Netherlands that is regulated by the DNB, an agency of the government of The Netherlands. Therefore, ING Bank meets the criteria of a "Qualified Foreign Bank," and qualifies as an "Eligible Foreign Custodian," under Rule 17f-5. However, the Special Purpose Corporations are not banking institutions organized under the law of The Netherlands and are only indirectly regulated by the DNB. Therefore, the Special Purpose Corporations do not themselves qualify under the literal terms of Rule 17f-5 as Eligible Foreign Custodians.^{20/} Nevertheless, the close operational relationship between ING Bank and each Special Purpose Corporation effectively renders the safekeeping of investments by the Special Purpose Corporations the safekeeping of investments by ING Bank itself.

Accordingly, ING Bank and the Special Purpose Corporations request confirmation from the Staff that it would not recommend enforcement action to the Commission if ING Bank employs the Special Purpose Corporations to hold for safekeeping investments of registered investment companies for which ING Bank acts as custodian.

^{18/} 15 C.F.R. 270.17f-5(a)(1).

^{19/} 17 C.F.R. § 270.17f-5(a)(4).

^{20/} In addition, neither Special Purpose Corporation is an Eligible Foreign Custodian by virtue of its status as either a securities depository or clearing agency that acts as a system for the central handling of securities or equivalent book-entries in The Netherlands, or a securities depository or clearing agency that acts as a transnational system for the central handling of securities or equivalent book-entries.

Office of Chief Counsel
May 20, 1999
Page 8

1. ING Bank Would Serve as Custodian for Investment Companies in Compliance with Rule 17f-5

Under a custodial agreement, ING Bank, an Eligible Foreign Custodian, would serve as custodian, or sub-custodian, for the investments of its registered investment company custodial clients. ING Bank would perform all administrative services to implement the custody of investment company investments, other than the actual safekeeping function, and would guarantee the Special Purpose Corporation's performance of its safekeeping function. Although the Special Purpose Corporations are separately incorporated under the laws of The Netherlands, in effect they function as operating divisions of ING Bank. The Special Purpose Corporations' operations are effected under the direction of ING Bank, in office space, with equipment and by personnel provided by ING Bank. As such, investments held for safekeeping by a Special Purpose Corporation would effectively be held for safekeeping by ING Bank in compliance with Rule 17f-5. ING Bank is acting through the Special Purpose Corporations in order to provide greater protection to its custodial clients, given the effect of the bankruptcy laws of The Netherlands.

2. The Special Purpose Corporations are, in Effect, Regulated by an Agency of the Government of The Netherlands in Compliance with Rule 17f-5

In order to qualify as an Eligible Foreign Custodian under Rule 17f-5, a foreign banking institution must be "regulated by a foreign government or an agency thereof." Although the Special Purpose Corporations are not banking institutions or trust companies, they are effectively regulated by the DNB, an agency of the government of The Netherlands, through the regulation by the DNB of ING Bank's management and operation of each Special Purpose Corporation. As a result, investments held for safekeeping by a Special Purpose Corporation could be said to be held by an institution regulated by an agency of a foreign government within the meaning of Rule 17f-5.

3. The Requested Relief is Consistent with the Purposes of Section 17(f) and Rule 17f-5

Consistent with the purposes of Section 17(f) and Rule 17f-5, the use of the Special Purpose Corporations by ING Bank to hold investment company investments for safekeeping would facilitate the safe custody of investment company investments in The Netherlands, by shielding those investments from ING Bank's creditors in the event of ING Bank's insolvency. The guarantee by ING Bank of a Special Purpose Corporation's performance of its safekeeping function also would ensure that investment company investments are effectively held "by a financially secure entity."^{21/}

^{21/} *Supra*, note 17.

Office of Chief Counsel

May 20, 1999

Page 9

4. The Requested Relief is Consistent with Exemptive Orders Previously Granted by the Commission

In April 1996, the Commission granted an exemption from the Section 17(f) to ABN AMRO Bank N.V. ("ABN AMRO") and MeesPierson N.V. ("MeesPierson")^{22/} permitting the special purpose corporations organized by ABN AMRO and MeesPierson under the Vabef Systems in The Netherlands, which did not qualify as Eligible Foreign Custodians under the literal terms of Rule 17f-5, to hold for safekeeping investment company investments in accordance with the terms of a custodial agreement.^{23/} Like the Special Purpose Corporations, the special purpose corporations engaged in no activities other than the safekeeping of investments for ABN AMRO or MeesPierson. Like ING Bank, ABN AMRO and MeesPierson each served as custodian and performed all administrative services to implement the custody of investments, other than the actual safekeeping function. ABN AMRO and MeesPierson also managed the day-to-day operations of their special purpose corporations by serving as their Managing Director and as a member of the Board of Directors of each administrative office that owned 100 percent of the shares of each special purpose corporation. Similarly, under the terms of a custodial agreement that a special purpose corporation entered into with ABN AMRO or MeesPierson and its custodial client, ABN AMRO or MeesPierson assumed liability for any loss, damage, cost, expense, liability or claim arising out of, or in connection with, the performance by the special purpose corporation of its responsibilities under the agreement to the same extent as if ABN AMRO or MeesPierson had been required to provide the safekeeping services itself.

^{22/} In re ABN AMRO, et al., SEC Rel. No. IC- 21857 (March 26, 1996) (Notice); SEC Rel. No. IC- 21911 (April 23, 1996) (Order).

^{23/} *Id.* The Commission also has issued similar, though not identical, exemptive relief to ING Bank and other foreign banks to delegate certain custodial functions to affiliated banks that did not satisfy the requirements of Rule 17f-5. In each case, ING Bank or a foreign bank proposed to delegate to an affiliated bank located in another country the services necessary to permit the affiliated bank to hold investments of registered investment companies in custody in that country. Exemptive relief was requested because the affiliated bank did not satisfy the minimum shareholder equity requirement necessary for a foreign bank to qualify as an Eligible Foreign Custodian before Rule 17f-5 was amended in 1997. As ING Bank has proposed herein, ING Bank and each foreign bank entered into an agreement with an affiliated bank and a registered investment company pursuant to which ING Bank or the foreign bank assumed liability for for any loss, damage cost, expense, liability or claim arising out of or in connection with the performance by the affiliated bank to the same extent as if ING Bank or the foreign bank had itself been required to provide custody services under such agreement. *See, e.g.,* ING Bank N. V. and ING Bank Eurasia, SEC Rel. No. IC-22329 (November 13, 1996) (Notice); SEC Rel. No. IC-22384 (December 10, 1996) (Order); *see also*, Credit Suisse, SEC Rel. No. IC-21676 (January 16, 1996) (Notice); SEC Rel. No. IC-21745 (February 13, 1996) (Order); In the Matter of Berliner Handels - Und Frankfurter Bank, SEC Rel. No. IC-20484 (August 16, 1994) (Notice); SEC Rel. No. IC-20419 (July 20, 1994) (Order); Barclays Bank, PLC, SEC Rel. No. IC-20128 (March 10, 1994) (Notice); SEC Rel. No. IC-20192 (April 5, 1994) (Order).

Office of Chief Counsel
May 20, 1999
Page 10

At the Staff's request, ING Bank and the Special Purpose Corporations are submitting this no-action request in lieu of an application for exemptive relief.^{24/}

III. Request for Relief

On the basis of the foregoing, we respectfully request that the Staff confirm that it will not recommend enforcement action to the Commission to the extent that ING Bank employs the Special Purpose Corporations to hold for safekeeping investments of registered investment companies for which ING Bank acts as custodian, as described above.

In accordance with Securities Act Release No. 6269, we have enclosed seven copies of this letter. If for any reason the Staff does not concur with the views expressed herein, we respectfully request the opportunity to confer with the Staff prior to any formal response to this no-action request. If you have any questions regarding this no action request, please call the undersigned at (212) 506-2670, of our New York office, or Diane E. Ambler at (202) 263-3230 or Kathy Kresch Ingber (202) 263-3277, of our Washington, D.C. office.

Very truly yours,



Beth R. Kramer

^{24/} At the Staff's request, an application for exemptive relief previously filed by ING Bank and the Special Purpose Corporations was withdrawn on November 3, 1998.