

**Investment Company Act of 1940 - Sections 22(e) and 27(i)(2)(A)  
ING Life Insurance and Annuity Company**

RESPONSE OF THE OFFICE OF  
INSURANCE PRODUCTS  
DIVISION OF INVESTMENT MANAGEMENT

August 30, 2012  
ING Life Insurance  
and Annuity Company

Based on the facts and representations in your letter dated August 29, 2012, and without necessarily agreeing with your legal analysis, we would not recommend enforcement action to the Commission against ING Life Insurance and Annuity Company ("ING Life") under Sections 22(e) and 27(i)(2)(A) of the Investment Company Act of 1940, as amended, (the "Investment Company Act" or "Act") if, in the limited circumstances described in your letter, ING Life permits certain sponsors of retirement programs under Section 403(b) of the Internal Revenue Code of 1986, as amended, (the "Code")<sup>1</sup> that are subject to the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") to:

1. apply the proceeds from their surrender of a group variable annuity contract or their redemption of mutual fund shares to the purchase of a group variable annuity contract issued by ING Life; and
2. automatically enroll employees in the sponsors' retirement program by adding such employees as participants under a group variable annuity contract issued by ING Life and to apply contributions on behalf of such participants to designated investment options under the contract.

Your letter explains that ING Life issues group variable annuity contracts to eligible employers to fund Section 403(b) retirement programs that are subject to ERISA. Section 403(b)(11) of the Code imposes certain withdrawal restrictions on such contracts, which are identified in your letter, and which conflict in certain respects with Sections 22(e) and 27(i)(2)(A) of the Act. Currently, ING Life issues such contracts in reliance on the relief provided by the Commission staff in *American Council of Life Insurance* (Nov. 28, 1988) (the "ACLI Letter").<sup>2</sup> In order to rely on the ACLI Letter, however, ING Life must obtain from each program participant a signed statement acknowledging the participant's understanding of the withdrawal restrictions imposed by Section 403(b)(11) and the investment options available under the program (an "Acknowledgement").

Your letter also explains that ING Life desires to accommodate requests of employers acquiring ING contracts to dispense with obtaining the Acknowledgments in two circumstances. First, when employers that own group variable annuity contracts (or sponsor custody account arrangements for holding mutual fund shares) as investment vehicles for Section 403(b) retirement programs covered by ERISA, acting in a fiduciary capacity with respect to their programs, determine to replace the group variable annuity contract (or custody account arrangement) with a group variable annuity contract issued by ING Life, such employers sometimes request that ING Life issue the new contract without obtaining Acknowledgments from each employee participating in their program. Second, where employers have automatic enrollment features in their ERISA-covered Section 403(b) programs that, in certain circumstances, cause new employees to be added as participants under a group

variable annuity contract issued by ING Life without an application form from such employees, the employers generally request that ING Life add the new employees as participants under the contract without obtaining Acknowledgements from such employees.

With regard to transactions in connection with contracts issued to replace existing contracts or custody account arrangements, your letter states that that ING Life would accept purchase payments under a contract issued to a program only after making a written attempt to obtain an Acknowledgement from each program participant. ING Life would send letters to each such participant at his or her last known address explaining that his or her employer had purchased a contract as a replacement for an existing group variable annuity contract or custody account arrangement as a funding vehicle for the program. The letter would also describe the employer's intentions with regard to the reallocation of current accumulations and future contributions under the existing contract or arrangement to the new ING contract and explain that the employer is seeking instructions as to allocation of such accumulations and contributions among the investment options available under the ING contract. Finally, the letter would inform participants that in the event that they do not provide allocation instructions, their employer would establish allocations for them and would identify such allocations. The letter would be accompanied by appropriate enrollment and investment option allocation forms for the participant to fill out and execute, which would include the Acknowledgement. In addition, the letter would include or be accompanied by a written notice explaining: (1) the contract provisions that reflect the Section 403(b)(11) restrictions; and (2) the various investment options available under the contracts and, if applicable, that investment options other than those available under the contracts may be available under the program. ING Life intends to wait at least 30 days after sending the letters before proceeding with the employer's requested transactions.

With regard to transactions in connection with automatic enrollments, your letter states that ING Life would act on the instructions of an employer only in compliance with, and subject to the conditions in, Section 624 of the Pension Protection Act of 2006 ("PPA") and regulations adopted by the Labor Department thereunder. In addition, no later than 30 days following automatic enrollment, ING Life would provide written notice to automatically enrolled participants explaining the contract provisions that reflect the Section 403(b)(11) withdrawal restrictions.

ING Life also represents that it would only dispense with Acknowledgements for employers meeting the following criteria:

They are fiduciaries of their program and their program is a Section 403(b) program subject to ERISA.

They have acknowledged that the selection of an investment option as a default investment by them and their determination that such option is a "qualified default investment option," as defined in Labor Department regulations under the PPA, has been made in their capacity as a fiduciary to their program.

In addition, ING Life would:

1. include appropriate disclosure regarding the redemption restrictions imposed by Section 403(b)(11) in each registration statement under the Securities Act

- of 1933, including the prospectus, used in connection with the offer of a contract;
2. include appropriate disclosure regarding the redemption restrictions imposed by Section 403(b)(11) in any sales literature used in connection with the offer of a contract;
  3. instruct sales representatives who solicit program participants or prospective program participants to purchase a contract (or become a group contract participant) specifically to bring the redemption restrictions imposed by Section 403(b)(11) to the attention of the participants;
  4. Except in the two circumstances described above (*i.e.*, certain contract replacements and automatic enrollments), obtain an Acknowledgement from each participant in a 403(b) program who purchases an ING Life contract (or becomes a group contract participant) prior to or at the time of such purchase
  5. include in any registration statement filed under the Securities Act of 1933 in connection with a contract a representation that this no-action letter is being relied upon and that the terms of this letter have been complied with; and
  6. not restrict redemptions or transfers by a 403(b) program participant under the terms of any contract funding a program, except as required by Section 403(b)(11) of the Code or as permitted by the Investment Company Act and regulations thereunder.

Our position permits restrictions on cash distributions to plan participants to the extent, and only to the extent, required by Section 403(b)(11) of the Code or permitted by the Investment Company Act and regulations thereunder. ING Life may not in any way act to deny or limit a specific transfer request except to the extent that a ruling of the Internal Revenue Service or written opinion of counsel specifically addressing the fact pattern involved, and taking into account the terms of the applicable employer plan, determines that denial or limitation is necessary for the annuity contracts to continue to meet the requirements of Section 403(b). Any transfer request not so denied or limited must be effected as expeditiously as possible.

Because our position is based on the facts and representations in your letter, you should note that different facts or representations may require a different conclusion. Further, this response expresses the position of the Division on enforcement only and does not purport to express any legal conclusions on the issues presented.

Patrick F. Scott  
Senior Counsel

## Endnotes

<sup>1</sup> Defined terms have the same meanings set forth in your letter.

<sup>2</sup> See, e.g., rule 3a-2 under the 1940 Act (providing, in effect, a one year safe harbor under certain circumstances to an issuer that otherwise meets the definition of investment company).