

July 7, 2011

DOL Opines on Scope of PTE 86-128

In [Advisory Opinion 2011-08A](#) (June 21, 2011), the U.S. Department of Labor (DOL) concluded that ERISA “investment advice” fiduciaries are within the scope of Prohibited Transaction Exemption (PTE) 86-128, thus confirming the availability of conditional relief for such a fiduciary (or an affiliate) to effect securities transactions or cross trades for a fee as an agent for an ERISA plan.

- This is one of several long-standing, unresolved issues under existing ERISA prohibited transaction relief that takes on greater importance in light of [DOL’s proposed expansion of the definition of “fiduciary.”](#)
- In particular, the reference in PTE 86-128 to a fiduciary “using its authority” to cause the plan to pay it a fee for a securities transaction gave rise to a lingering question of whether fiduciaries that only provide investment advice were excluded from the scope of the exemption.

DOL considered this issue on a timely basis, in relation to its ongoing regulatory process for redefining “fiduciary.” DOL properly confirmed that PTE 86-128 is available to any fiduciary within the meaning of ERISA § 3(21)(A), including those who only provide investment advice (subject to the special provisions in the exemption for plan sponsors, administrators and certain other fiduciaries).



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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