

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.*

Daniel M. Buchner	202.383.0869	<a href="mailto:daniel.buchner@sutherland.com">daniel.buchner@sutherland.com</a>
Adam B. Cohen	202.383.0167	<a href="mailto:adam.cohen@sutherland.com">adam.cohen@sutherland.com</a>
Jamey A. Medlin	404.853.8198	<a href="mailto:jamey.medlin@sutherland.com">jamey.medlin@sutherland.com</a>
Alice Murtos	404.853.8410	<a href="mailto:alice.murtos@sutherland.com">alice.murtos@sutherland.com</a>
Joanna G. Myers	202.383.0237	<a href="mailto:joanna.myers@sutherland.com">joanna.myers@sutherland.com</a>
Robert J. Neis	404.853.8270	<a href="mailto:robert.neis@sutherland.com">robert.neis@sutherland.com</a>
Vanessa A. Scott	202.383.0215	<a href="mailto:vanessa.scott@sutherland.com">vanessa.scott@sutherland.com</a>
W. Mark Smith	202.383.0221	<a href="mailto:mark.smith@sutherland.com">mark.smith@sutherland.com</a>
William J. Walderman	202.383.0243	<a href="mailto:william.walderman@sutherland.com">william.walderman@sutherland.com</a>
Carol A. Weiser	202.383.0728	<a href="mailto:carol.weiser@sutherland.com">carol.weiser@sutherland.com</a>

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