

**June 21, 2011**

Melanie Franco Nussdorf, Esq.
Steptoe and Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

2011-08A
PTE 86-128

Dear Ms. Nussdorf:

This is in response to your request for guidance concerning the application of Prohibited Transaction Exemption (PTE) 86-128.¹ This exemption permits a plan fiduciary (or an affiliate) to engage in securities transactions for a fee as an agent on behalf of a plan. You ask if this exemption is available to a person who is a fiduciary by reason of rendering investment advice to a plan. Without the exemption, this activity would violate the prohibitions against self-dealing in ERISA and the Internal Revenue Code. As explained below, we conclude that the exemption applies to investment advice fiduciaries.

Section 3(21)(A) of ERISA provides that a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Regulations issued by the Department at 29 CFR 2510.3-21(c), define the circumstances under which a person renders "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA.²

PTE 86-128 provides that section 406(b) of ERISA shall not apply to: (a) A plan fiduciary's using its authority to cause a plan to pay a fee for effecting or executing securities transactions to that person as agent for the plan, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency; (b) A plan fiduciary's acting as the agent in an agency cross transaction for both the plan and one or more other parties to the transaction; and (c) the receipt by a plan fiduciary of reasonable compensation for effecting or executing an agency cross transaction to which a plan is a party from one or more other parties to the transaction.

¹ 51 FR 41686, Nov. 18, 1986, amended at 67 FR 64137 (Oct. 17, 2002).

² On October 22, 2010, the Department published a notice of Proposed Amendment to Regulation Under ERISA Section 3(21)(A)(ii). This proposed regulation if adopted, will amend the regulation at 29 CFR 2510.3-21(c).

It is the Department's view that PTE 86-128 provides relief for covered transactions engaged in by any person who meets the definition of fiduciary as that term is defined in section 3(21)(A) of ERISA including a person who is a fiduciary solely by reason of rendering investment advice. It is the Department's further view that a fiduciary or an affiliate who receives a fee for executing securities transactions carried out in accordance with the fiduciary's investment advice would be using its authority as a fiduciary to cause the plan to pay a fee within the meaning of section II(a) of the exemption.

Although, PTE 86-128 does not include a definition of the term fiduciary, the Department believes that the definition of the term fiduciary contained in section 3(21)(A) of ERISA, provides guidance as to the scope of the term used in the exemption. In addition, section III(a) of PTE 86-128, as amended, specifically excludes plan administrators and plan sponsors from the scope of relief. PTE 86-128 contains no such exclusion with regard to those fiduciaries described in ERISA section 3(21)(A)(ii).³

Furthermore, in the preamble to the notice of proposed exemption to PTE 79-1, the predecessor to PTE 86-128, the Department discussed various circumstances in which the broker-dealer would be considered a fiduciary under ERISA.⁴ The Department noted that a person can be a fiduciary for reasons other than exercising investment discretion. "For example, the term "fiduciary" includes a person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so."⁵

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10, relating to the effect of advisory opinions. This opinion relates only to the specific issue addressed herein.

Sincerely,

Ivan L. Strasfeld
Director
Office of Exemption Determinations

³ PTE 86-128 provides limited relief for plan administrators and plan sponsors to engage in covered transactions provided such person engaging in the covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction. See section IV(c) of PTE 86-128. In 2002, PTE 86-128 was amended (67 FR 64137, October 17, 2002) to permit certain trustees to engage in covered transactions on behalf of a plan.

⁴ PTE 86-128 replaced PTE 79-1 (44 FR 5963, January 30, 1979) and PTE 84-46 (49 FR 22157, May 25, 1984). In this regard, PTE 79-1 replaced PTE 75-1, Part I(a).

⁵ See footnote 2 of the proposed exemption to PTE 79-1, at 43 FR 55005, November 24, 1978.