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DOL Opines on Prohibited Transaction Relief for Indemnities for Futures Trading Accounts

In [Advisory Opinion 2011-09A \(October 20, 2011\)](#), the U.S. Department of Labor (DOL) returned to the ERISA prohibited transaction treatment of futures contracts in individual retirement accounts (IRA). [DOL opined in 2009](#) that the pledge of an IRA owner's personal assets at a brokerage firm to cover investment losses or taxes in excess of the IRA account balance incurred in a futures trading account maintained by the broker for the IRA was a prohibited extension of credit from the IRA owner to the IRA under Internal Revenue Code § 4975. In the 2011 opinion, DOL considered whether an indemnification of the broker by the IRA owner to similar effect would qualify for the relief provided by PTE 80-26, exempting loans or other extensions of credit for the payment of ordinary operating expenses of the plan or for a purpose incidental to the ordinary operation of the plan. DOL argued that the investment performance of a futures contract is independent of and unrelated to any activity attributable to the operation of the IRA, and that investment in a futures contract is not incidental to the operation of an IRA. Accordingly, DOL opined that PTE 80-26 relief was not available for the indemnification. (Although the opinion did not address this point, the relief for prohibited loans provided by section 4975(d)(20), the counterpart to ERISA section 408(b)(17) added by the Pension Protection Act of 2006, presumably was also unavailable, because the IRA owner was acting as a fiduciary and was not just a service provider.)

It is important, primarily for tax policy reasons, to preserve a wall between an IRA and the IRA owner's personal estate, and the section 4975 prohibited transaction rules support that objective. Nonetheless, DOL's argument that investment activity is outside the scope of the ordinary operation of an IRA for purposes of PTE 80-26 seems dubious at best – investments are integral to the operation of retirement plans – and may lead to unfortunate conclusions in other circumstances. This opinion also highlights the continuing challenges of fitting IRAs, and otherwise conventional investment transactions available to retail investors, into the prohibited transaction regulatory regime.



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