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## IRS Provides Temporary Relief for IRA Cross-Collateralization Agreements

In [Announcement 2011-81](#) (December 12, 2011), the Internal Revenue Service (IRS) granted temporary relief for an indemnity, security interest or other cross-collateralization agreement provided by an individual retirement account (IRA) owner in circumstances similar to those addressed in U.S. Department of Labor (DOL) [Advisory Opinion 2009-03A](#) and [Advisory Opinion 2011-09A](#). Those opinions conclude, generally, that a cross-collateralization agreement committing non-IRA assets of the IRA owner to cover indebtedness of, or arising from, the IRA to a bank or other financial institution is an ERISA prohibited transaction for which PTE 80-26 does not provide exemptive relief.

The Announcement states that DOL is considering further action to address these issues, including a possible prohibited transaction class exemption. The Announcement further provides that, pending further action from DOL or guidance from the IRS, the tax treatment of an IRA will be determined without taking into account the potential prohibited transaction consequences of such a cross-collateralization agreement so long as there has been no execution or other enforcement of the agreement against IRA assets (that is, the flip side of the fact pattern considered in the Advisory Opinions).

- This is a constructive position for the IRS to take.
- If IRA assets are actually drawn down under a cross-collateralization agreement to satisfy liabilities arising from non-IRA accounts – i.e., in the circumstance for which relief is not provided – the Announcement allows the IRS to take the position that the IRA has been disqualified for tax purposes, subject to any retroactive prohibited transaction exemption or other guidance DOL may issue in the future.
- Accordingly, parties to cross-collateralization agreements that include IRAs may want to consider steps to avoid enforcement against IRA assets pending resolution of these issues.



*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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