The Employee Benefits Security Administration
U.S. Department of Labor

Getting it right –

Know Your Fiduciary Responsibilities

A Compliance Assistance Program

Fiduciary Responsibility - Overview

What is a “fiduciary”?

- In general – position of trust, acting for the benefit of others with a high duty of care and loyalty
- ERISA – any person who exercises discretionary authority or control over plan assets or administration, or gives investment advice

Basic fiduciary duties

- Acting solely in the interests of the participants and their beneficiaries
- Being prudent
- Paying only reasonable and necessary expenses of the plan
- Following the terms of the plan

Solely in the interest of means -

- Decisions made exclusively on the basis of what is good for the plan and its participants and beneficiaries

Prudence – If you need help, get it!

- Fiduciary must act with the care, skill, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would use.

Reasonable expenses means -

- Expenses are reasonable only if they are necessary for the operation of the plan, and are not excessive for the service received.

For example –

Following terms of the plan means -

- Follow the terms of the plan – do not exercise personal discretion when terms of plan are clear

For Example -

Missing participants

- Common problem, particularly in terminated defined contribution plans
- Guidance – Field Assistance Bulletin 2004-02:
  - Steps fiduciary must take to locate missing participants
  - Distribution options if fiduciary cannot locate missing participant

Automatic Rollover Safe Harbor Regulation - 29 CFR 2550.404a-2

- If plan has mandatory distributions, rollover to IRA required when participant fails to give instructions

- DOL issued fiduciary safe harbor providing relief for:
  - Selection of provider
  - Selection of investments

Limits on fiduciary liability

- Allocation of fiduciary duties
- Participant-directed plans under Sec. 404(c) of ERISA
- Not all acts relating to a plan are "fiduciary" acts – some are "settlor"

What if a fiduciary fails to fulfill his or her obligations?

Pay the plan or the Government

- Restore losses
- Give up any profits
- The DOL and IRS may assess civil penalties and excise taxes
- Fiduciary may be removed, barred from being a fiduciary

Co-fiduciary liability

A fiduciary will be liable for another fiduciary’s violation if the fiduciary –

- participates in or acts to conceal a violation
- permits the other fiduciary to commit a violation
- has knowledge of another fiduciary’s violation and fails to take reasonable steps to remedy

Steps to avoid common problems

1. Understand your plan and your responsibilities

2. Carefully select service providers

3. Make timely contributions

4. Avoid prohibited transactions

5. Make timely reports to government and disclosures to participants.

Step 2

Carefully select service providers for the plan

Tips for selecting service providers

- ✓ Obtain information from more than one service provider
- ✓ For valid comparison, make sure each provider has same information
- ✓ Consider "bundled" and "unbundled" services
- ✓ Check license if required (attorney, accountant, etc)

Tips *continued*

- ✓ Understand terms of contracts
- ✓ Document process used in reviewing and selecting service providers
- ✓ Get regular updates on services
- ✓ Renewal - repeat the selection process & confirm that facts on which initial selection was made have not changed

Monitor plan service providers

Plan fiduciaries must prudently select plan service providers and periodically monitor them to make sure the services are being delivered as agreed.

Remember - the plan fiduciary may be liable if the service provider fails to carry out its responsibilities.

Fees and expenses

- Fiduciary has a duty to ensure that fees and expenses paid by the plan are reasonable in light of the quality and quantity of services provided.
- Both costs and quality are important factors.
- Ask if the provider is receiving fees from third parties, such as "12b-1" fees.

For help - *see*

- Selecting an Auditor for Your Employee Benefit Plan

- Understanding Retirement Plan Fees and Expenses

- 401(k) Plan Fee Disclosure Form at www.dol.gov/ebsa/pdf/401kfefm.pdf [(American Bankers Assoc., Investment Company Institute and American Council of Life Insurance)]

Step 3

Make timely contributions

Overview

- Employer contributions - contribute per plan documents – failure may result in legal action by plan fiduciary.
- Participant contributions – become "plan assets" when reasonably segregable from employer's general assets – failure may result in violation of trust requirements and prohibited transactions.

Participant contributions – *the rule*

- Amounts withheld from employees' wages must be transmitted to plan ***as soon as they reasonably can be segregated from the company's general assets.*** See safe harbor rule for small plans.

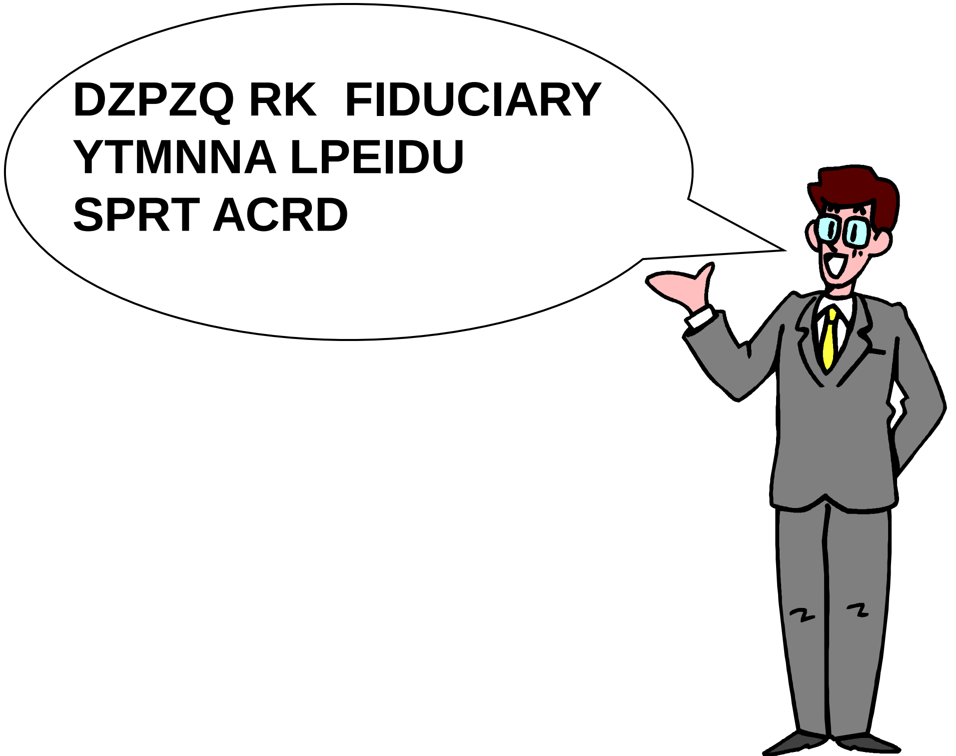
  but in no event later than – 15th business day of the month following month of withholding – this is **not** a safe harbor

Step 4

Avoid prohibited transactions

ERISAspeak

A fiduciary of a Plan shall not cause the Plan to engage in a transaction, if he knows or should know that such transaction is either directly or indirectly between the Plan and a party in interest.



Parties in Interest

Generally, people or entities that are related to a Plan.

The main categories are:

- Fiduciaries
- Employees of a Plan
- The Sponsoring Employer
- Service Providers

More Parties in Interest

- Employees, officers, and directors of the sponsoring employer and of plan service providers as well as 50% or more owners of the employer

- Relatives (spouses, ancestors, lineal descendants, spouses of lineal descendants) of fiduciaries, service providers, sponsoring employers

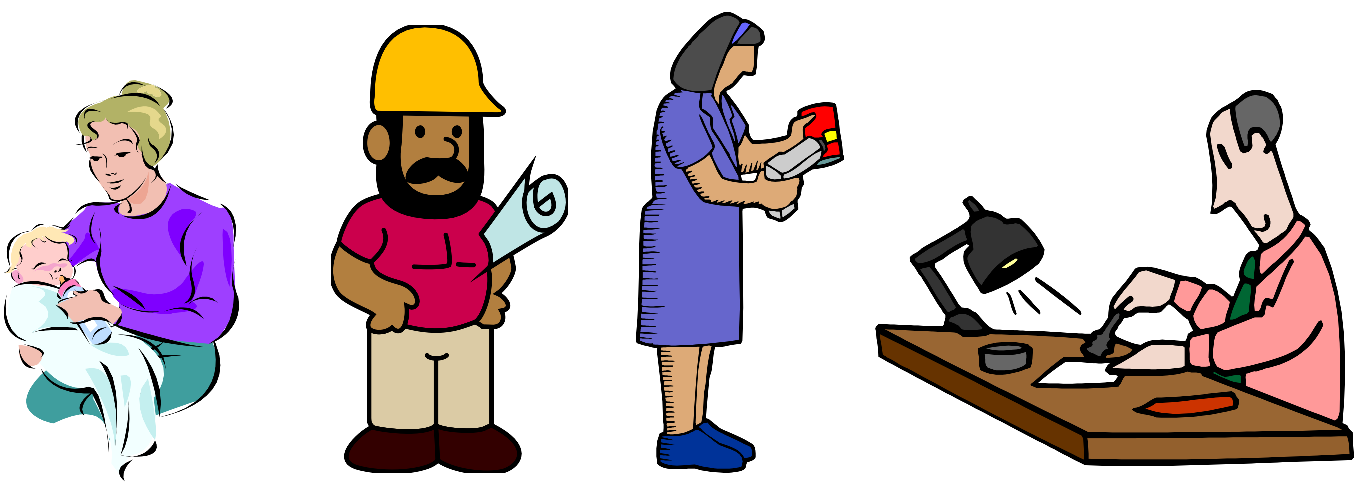
Prohibited Transactions

(AKA – **What** not to do with the Plan's money and/or assets and **who** not to do it with)

Prohibited Transactions

Why?– to protect Plan participants and their beneficiaries by making sure that their **retirement** Plan **benefit**s are available as promised under their Plan.

Plan Participants



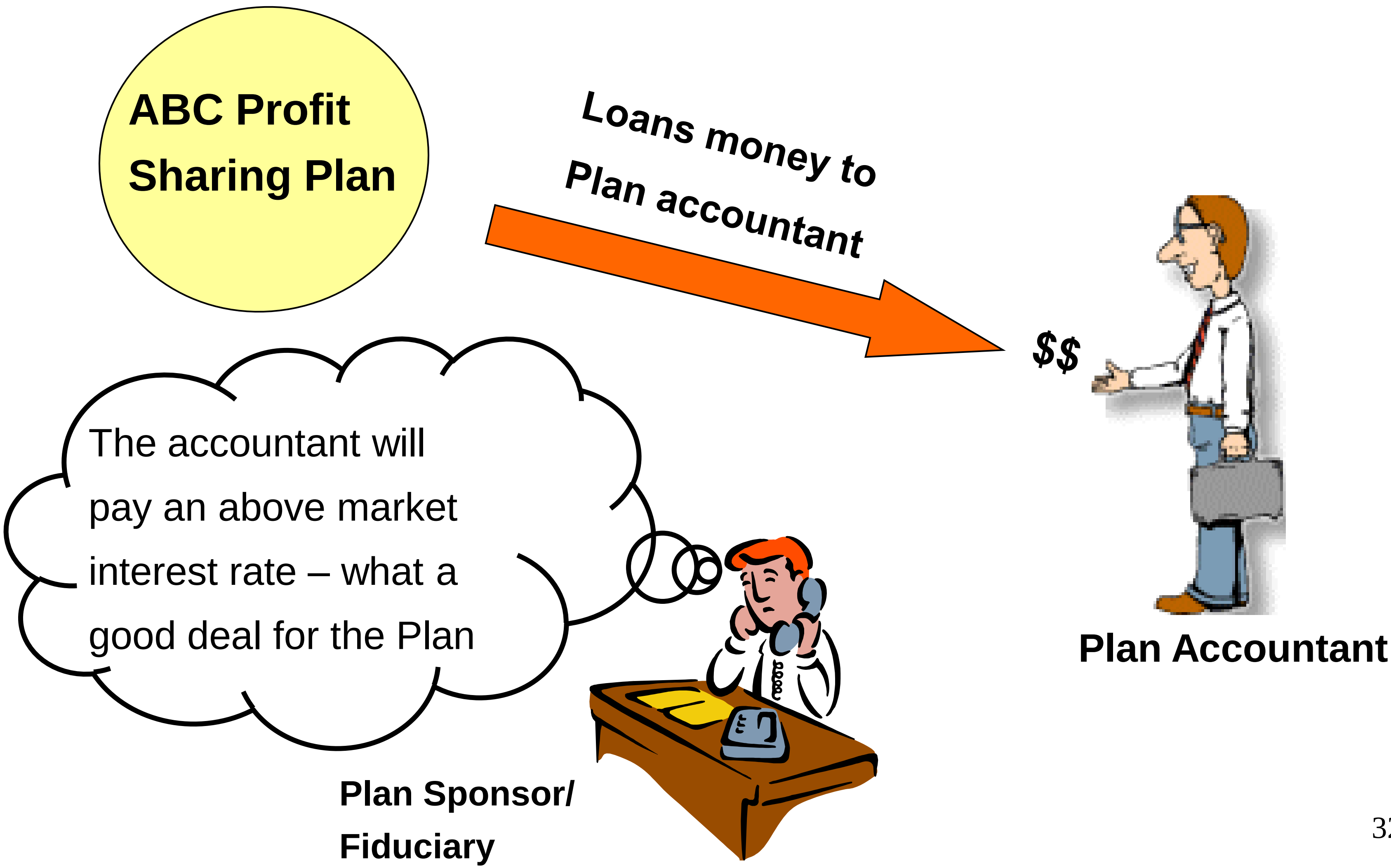
Prohibited Transactions

As a fiduciary you cannot cause the Plan to buy or sell or lease property from/to a related party.

Prohibited Transactions

A fiduciary cannot cause a Plan to receive a loan from or grant a loan to a related party, or cause there to be an extension of credit between the Plan and a related party.

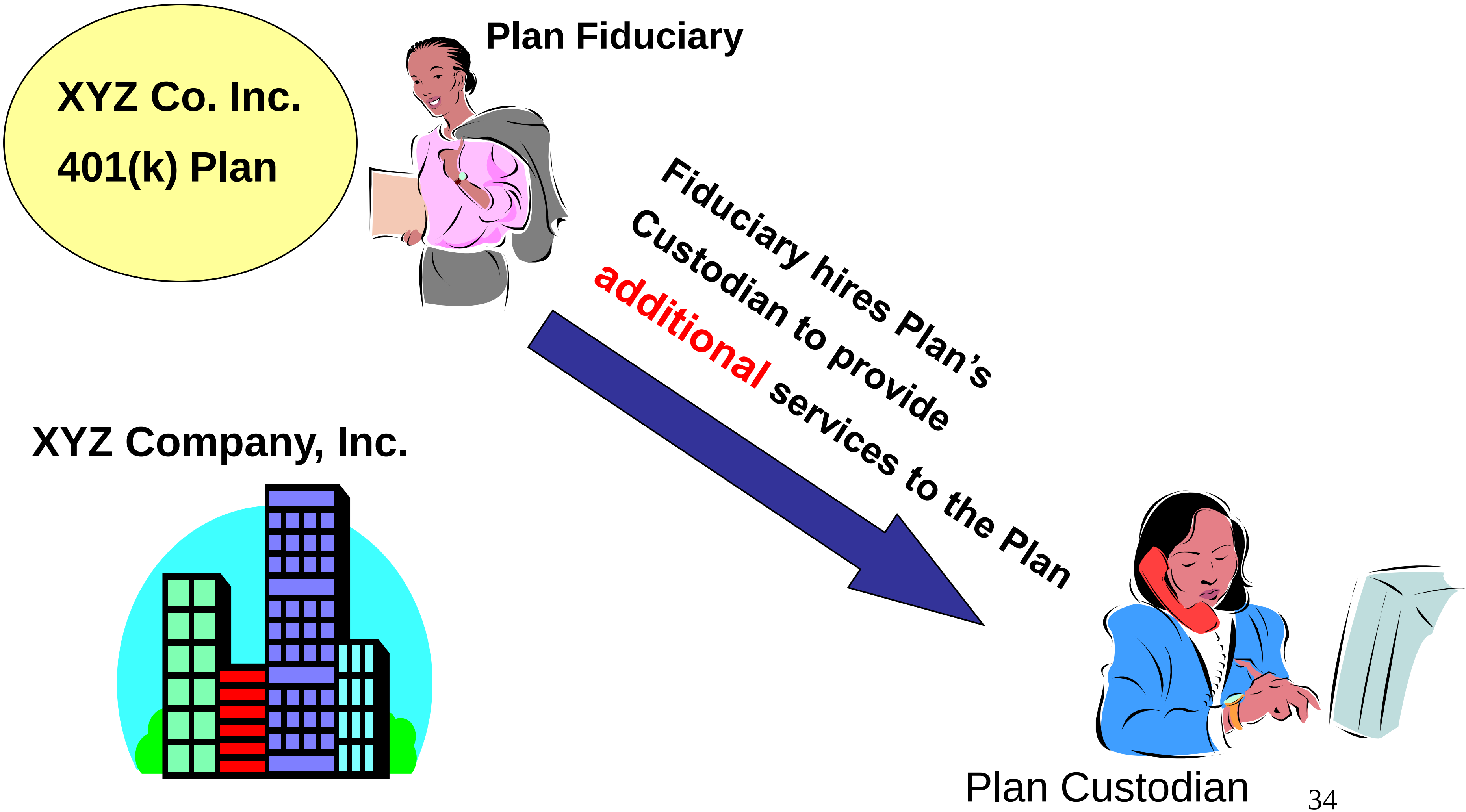
Example


ABC Profit Sharing Plan
Loans money to Plan accountant
$$
Plan Accountant
The accountant will pay an above market interest rate – what a good deal for the Plan
Plan Sponsor/ Fiduciary

Prohibited Transactions

A fiduciary cannot cause a Plan to receive services or goods from a party in interest.

Example


XYZ Co. Inc.
401(k) Plan
Plan Fiduciary
Fiduciary hires Plan's
Custodian to provide
additional services to the Plan
XYZ Company, Inc.
Plan Custodian

Prohibited Transactions

A fiduciary cannot use Plan assets to benefit a party in interest.

Example

The Plan is overfunded this year! Here's some money for your father's surgery.

Plan Assets
$$$$

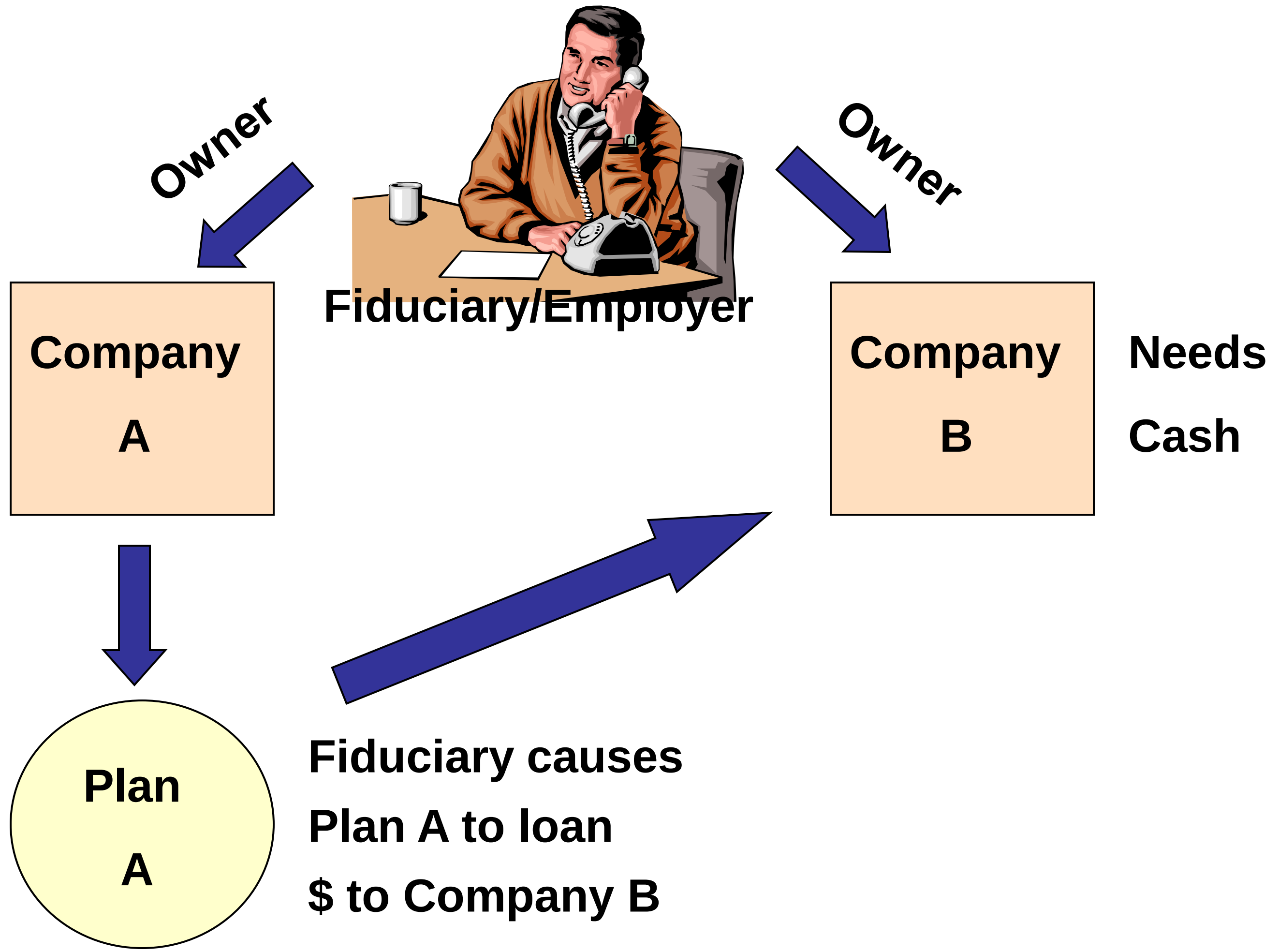
Employee/Related Party

Plan Sponsor/Fiduciary

Prohibited Transactions

In your capacity as a Plan fiduciary, you cannot deal with the Plan’s assets for your own benefit.

Example

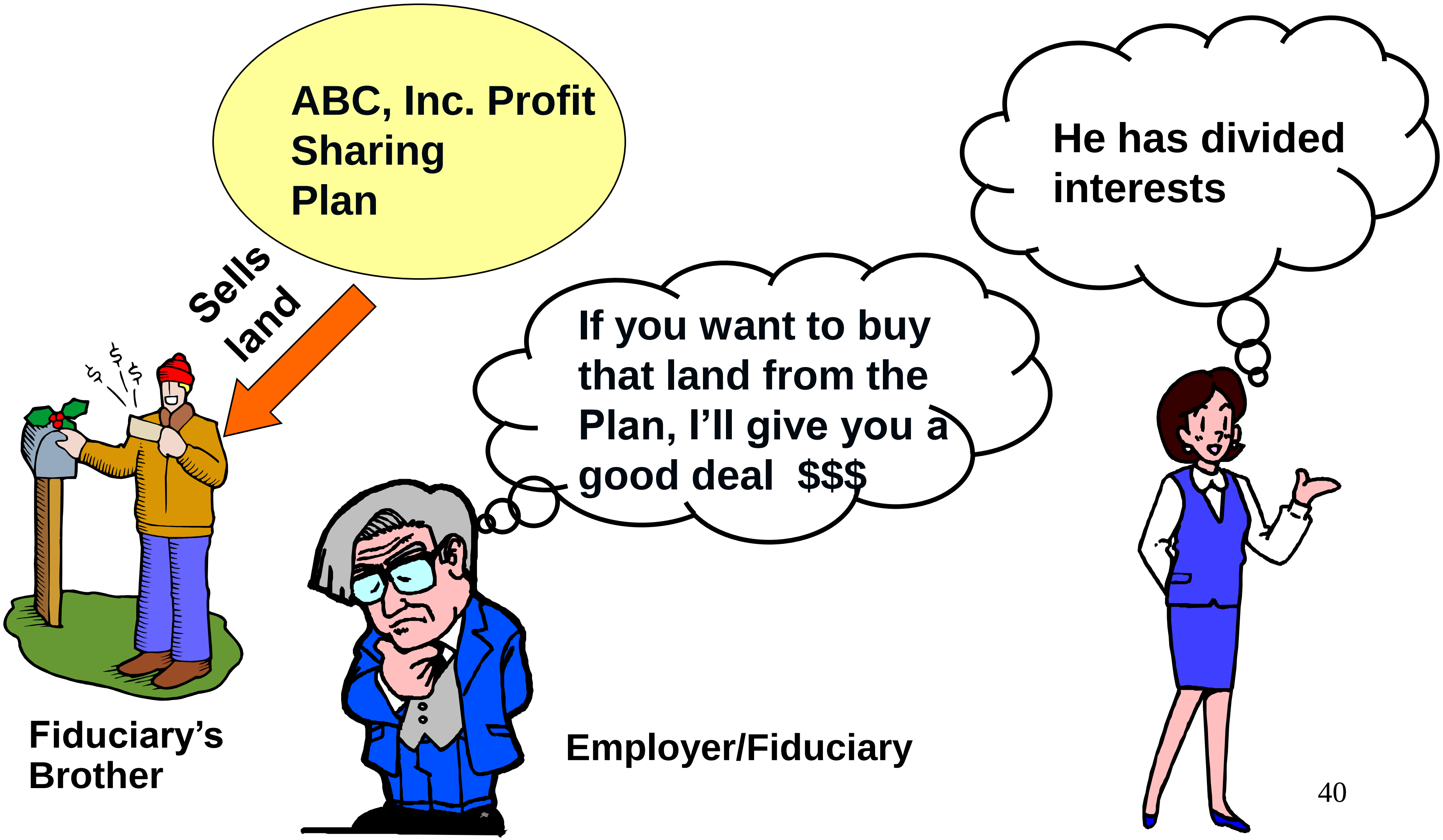


Owner
Owner
Fiduciary/Employer
Company
A
Company
B
Needs
Cash
Plan
A
Fiduciary causes
Plan A to loan
$ to Company B

Prohibited Transactions

In your capacity as a Plan fiduciary, when dealing on behalf of the Plan you cannot represent or act on behalf of anyone who has adverse interests to the interests of the Plan.

Example


ABC, Inc. Profit Sharing Plan
Sells land
If you want to buy that land from the Plan, I'll give you a good deal $$$
He has divided interests
Fiduciary's Brother
Employer/Fiduciary

Prohibited Transactions

As a Plan fiduciary you cannot get a payment or benefit from anyone in connection with a Plan transaction.

Example

401(k) Plan

Hire me as the plan's record keeper and I'll do your personal taxes for free

Employer/ Fiduciary

Accountant

Fiduciary Tips

- Identify the related parties to the Plan.
- Do not use the Plan or its assets to benefit the related parties or yourself.
- Do not cause or allow the Plan to engage in transactions with related parties **unless** the transaction is exempted.

Exemptions

- Some transactions that are prohibited are allowed if they are covered by an exemption.
- Some exemptions are specified in ERISA. These are called "statutory exemptions."

Example

Service Provider Exemption

- **PT** - fiduciary causes a Plan to receive services from a related party.
- **EXEMPTION** - permits service contracts with related parties provided that very specific conditions are met.

Conditions of the Exemption

- necessary service
- reasonable contract
- reasonable compensation

Statutory Exemption

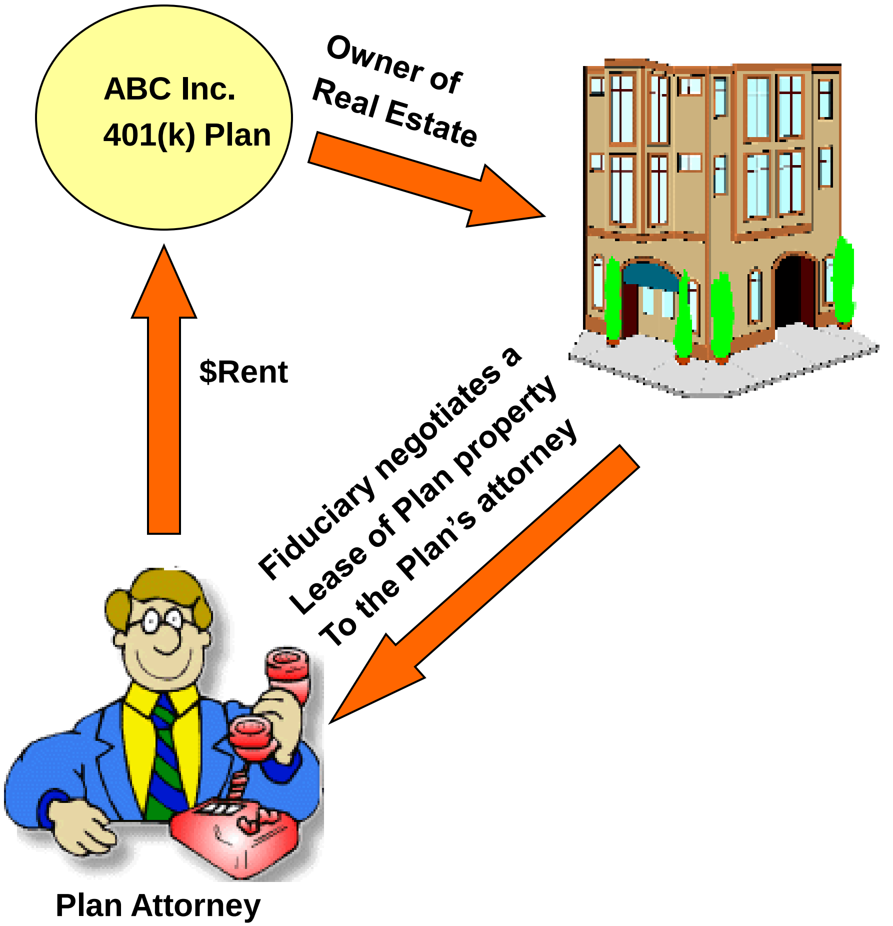
ERISA § 408(b)(17)

In addition to § 408(b)(2), this statutory exemption exempts:

- Leases
- Loans
- Transfers

between a plan and a service provider.

Example


ABC Inc.
401(k) Plan
Owner of
Real Estate
$Rent
Fiduciary negotiates a
Lease of Plan property
To the Plan's attorney
Plan Attorney


ABC Profit
Sharing Plan
Loans money to
Plan accountant
$$
The accountant will
pay an above market
interest rate – what a
good deal for the Plan
Plan Accountant
Plan Sponsor/
Fiduciary

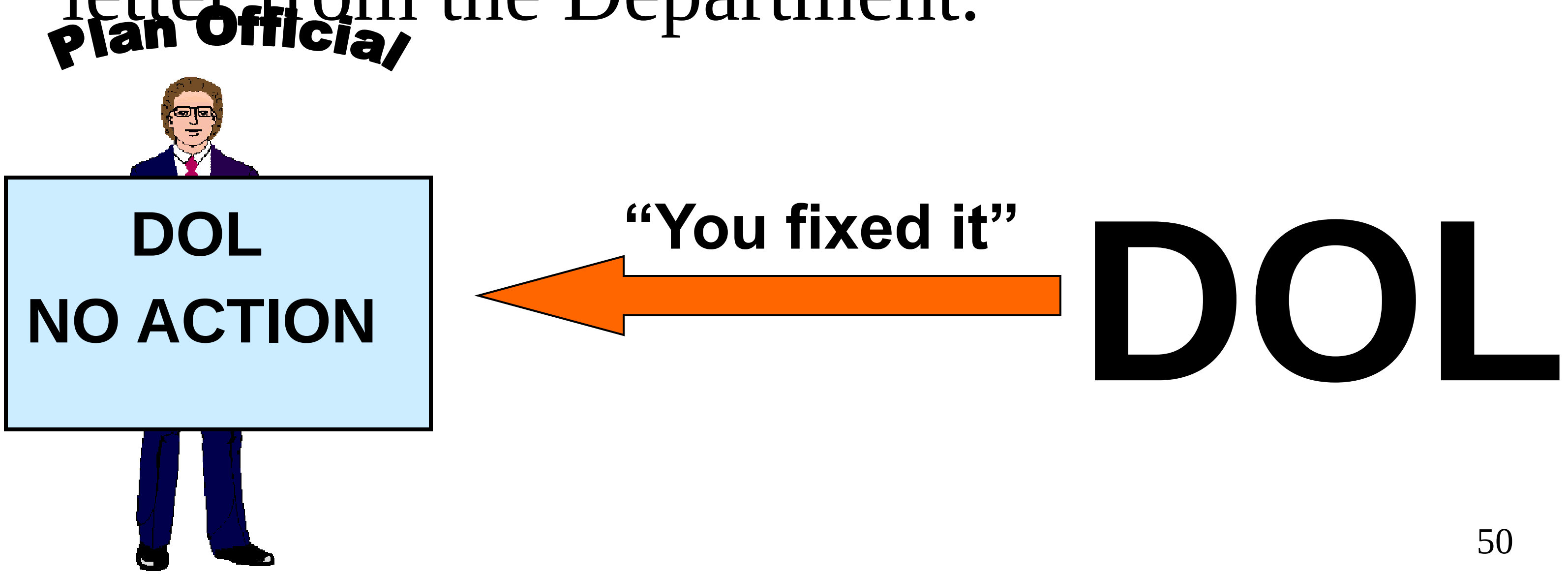
Exemptions

Individual Exemptions - some exemptions are created just for specific parties to engage in a specific transaction based upon a written application to the Department of Labor.

Class Exemptions - some exemptions apply more broadly to specified transactions or a specified industry.

Voluntary Fiduciary Correction Program

Allows "Plan Officials" to correct certain violations before DOL investigates and if done properly, receive a "No-Action" letter from the Department.



VFC Program

- ✓ Covers 19 specific transactions and describes how to correct them.
- ✓ Eligibility is conditioned upon not being “Under Investigation” and upon the application not containing any evidence of criminal violations.
- ✓ Correction must be made prior to submitting an application to the VFC Program Coordinator in the EBSA Regional Office.

What about excise taxes?

Note:

- The Program does not get you out of IRS excise tax liability.
- In some cases excise taxes may be avoided if the conditions of a DOL class exemption are met.

Abandoned Plan Regulation

Establishes:

- Standards for determining when a plan is “abandoned”
- Process for winding up the affairs of the plan and distributing benefits

EBSA Contact Information

- EBSA Regional Offices

  (866) 444-EBSA

- Office of Regulations & Interpretations

  (202) 693-8500

- Office of Exemption Determinations

  (202) 693-8540

- EBSA website: www.dol.gov/ebsa