

# GETTING IT RIGHT – KNOW YOUR FIDUCIARY RESPONSIBILITIES

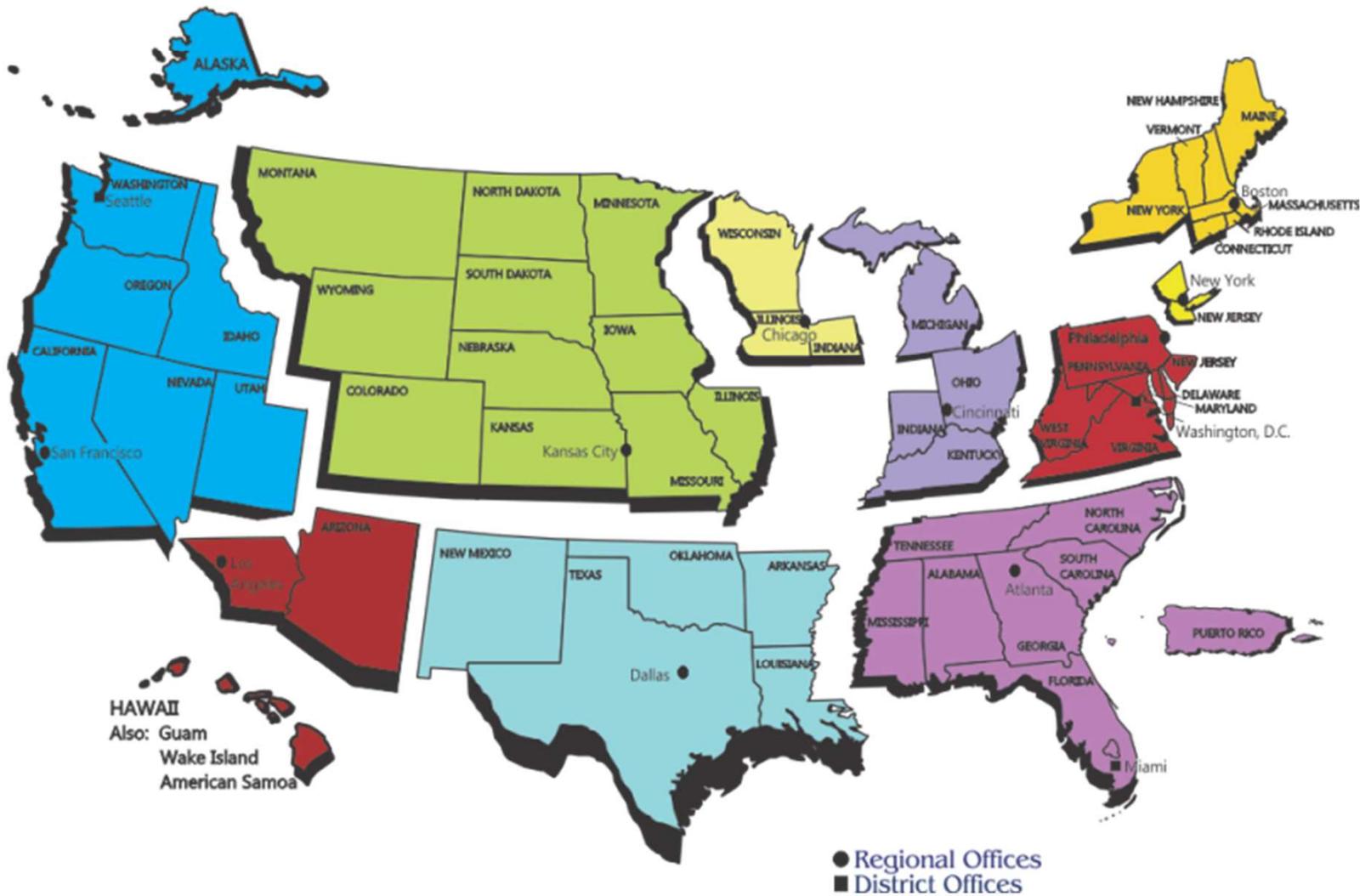

A COMPLIANCE ASSISTANCE PROGRAM



EMPLOYEE BENEFITS SECURITY ADMINISTRATION  
U.S. DEPARTMENT OF LABOR



# EBSA FIELD OFFICES



# ■ SEMINAR OVERVIEW

- I. BASIC RULES OF FIDUCIARY RESPONSIBILITY UNDER ERISA**
- II. GETTING IT RIGHT BY AVOIDING COMMON PROBLEMS**
- III. VOLUNTARY CORRECTION PROGRAMS**
- IV. WRAP UP WITH QUESTIONS & ANSWERS**

## **■ GETTING IT RIGHT *MEANS***

- 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**

---

## ■ ERISA AND INTERNAL REVENUE CODE

### **ERISA –**

reporting, disclosure, fiduciary responsibility, prohibited transactions, benefit claims procedures, etc.

### **INTERNAL REVENUE CODE –**

tax qualification rules

## ELEMENTS OF A PLAN

- **ERISA AND THE CODE** – plans must be maintained pursuant to written instruments
  - describing benefit structure and operation
- **ERISA** also requires that the written instruments provide for one or more “named fiduciaries” – responsible for the operation and administration of the plan



# **FIDUCIARY RESPONSIBILITY – OVERVIEW**

- **WHAT AND WHO IS A  
“FIDUCIARY”**
- **PRIMARY DUTIES OF A  
FIDUCIARY**
- **LIMITS ON FIDUCIARY DUTIES**
- **FAILURE TO DISCHARGE  
FIDUCIARY DUTIES**
- **AVOIDING PROBLEMS**

## ■ 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 for a fee

---

## ■ FIDUCIARY?

- PLAN ADMINISTRATOR
- TRUSTEE
- PLAN SPONSOR
- INVESTMENT MANAGER
- PLAN ATTORNEY OR  
ACCOUNTANT
- INSURANCE COMPANY

## 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 — DON'T PAY TWICE**

**In-house  
Recordkeeper**

**&**

**Third Party  
Recordkeeper**

---

■ **FOLLOWING TERMS OF  
THE PLAN *means* -**

- **FOLLOW THE TERMS OF  
THE PLAN** – do not exercise  
personal discretion when terms of  
plan are clear



## ALLOCATION TO OTHER FIDUCIARIES

- If plan permits, fiduciaries may allocate responsibilities – not liable for acts or omissions of other fiduciaries.
- Appointment of “investment manager” – not liable for acts or omissions of investment manager.
- Duty to monitor other fiduciaries.

## PARTICIPANT-DIRECTED ACCOUNTS

- Fiduciaries of individual account plans (such as a 401(k)) not liable for investment decisions of participants – if participants exercise control
  - Must meet requirements of DOL regulation
  - Liability for investment options

## ■ DEFAULT INVESTMENTS

- Selection of a qualified default investment alternative (QDIA) is a fiduciary act
- Fiduciaries of 401(k)-type plans may limit liability for investing contributions on behalf of participants who fail to provide investment directions
- Must meet requirements of QDIA regulation
- Examples of QDIAs include balanced funds and target date funds

## ■ “SETTLOR” (BUSINESS) VS. FIDUCIARY ACTS?

- When a plan sponsor makes a business decision in relation to plan design, plan amendment, plan termination, acting as settlor not as fiduciary –decisions not governed by fiduciary rules
- Plan assets may **NOT** be used to pay for settlor activities
- Implementation of settlor decisions may be fiduciary acts

## ■ DOL GUIDANCE -

- ADVISORY OPINION 2001-01A –
  - No apportioning required for expense of maintaining tax-qualified status of plan
- HYPOTHETICAL EXAMPLES –
  - Posted on website with AO 2001-01A at [www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/date/2001](http://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/date/2001)

## ■ FOR EXAMPLE -

- Decision to offer participant loans is “settlor.”
- Plan assets may not be used to pay for any studies done in making decision or to amend the plan to add the program.
- Once the loan program is in place, decisions concerning loans (e.g., rate, duration, security) are fiduciary.

## MISSING PARTICIPANTS – FAB 2014-01

### Locating Missing Participants of Terminated Defined Contribution Plans

#### Plan fiduciary *must always*:

1. Use Certified Mail
2. Check Related Plan and Employer Records
3. Check with Designated Plan Beneficiary
4. Use Free Electronic Search Tools

## ■ MISSING PARTICIPANTS – FAB 2014-01

### Making Distributions

#### ■ Preferred Option:

- Rollover to Individual Retirement Plan
- E.g., Safe Harbor for Terminated DC Plans

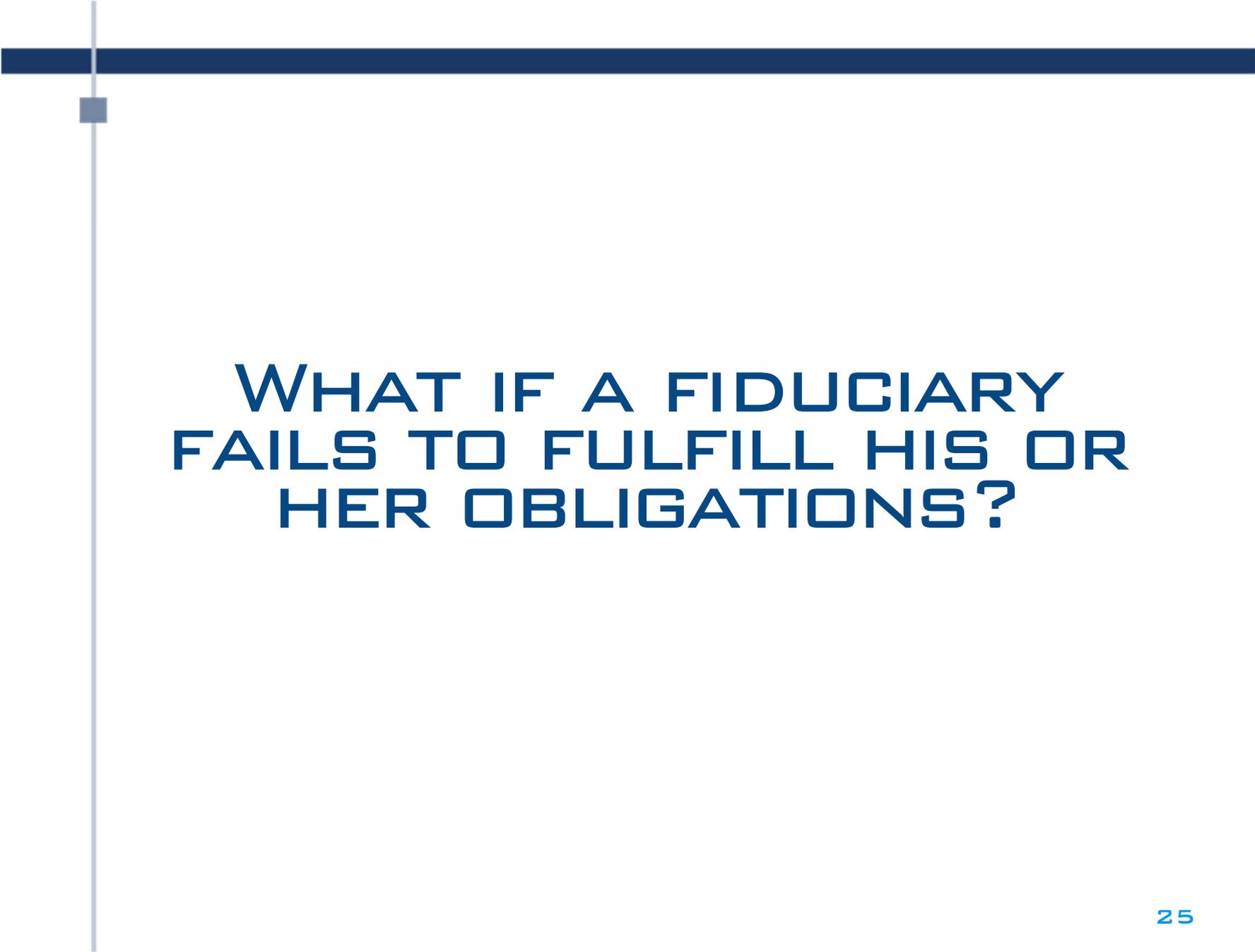
#### ■ Other Options:

- Interest-bearing, federally insured bank account
- State unclaimed property fund

## ■ MISSING PARTICIPANTS – FAB 2014-01

### Other Issues

- 100% income tax withholding is **not** an acceptable distribution option
- **USA PATRIOT Act** compliance not required at time fiduciary establishes account in name of missing participant
- **FAQs: Final CIP Rule**  
**[www.fincen.gov/finalciprule.pdf](http://www.fincen.gov/finalciprule.pdf)**



**WHAT IF A FIDUCIARY  
FAILS TO FULFILL HIS OR  
HER OBLIGATIONS?**

---

## ■ PAY THE PLAN

- Restore losses
- Give up any profits



---

## ■ **PAY THE GOVERNMENT**

- **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**

## ■ STEP 1

# UNDERSTAND YOUR PLAN AND YOUR RESPONSIBILITIES



---

- KNOW WHO IS RESPONSIBLE FOR VARIOUS ACTIVITIES REQUIRED BY PLAN**

**Custody of plan assets**

**Recordkeeping**

**Benefit decisions**

**Directing investments**

## CAREFUL SELECTION OF SERVICE PROVIDERS

- When you need help, get help – *remember the prudent expert rule*
- A fiduciary's success may depend on how well the fiduciary selects the plan's service providers
- The selection of service providers is a fiduciary act – *prudence is a process*

## **TIPS FOR SELECTING SERVICE PROVIDERS**

- ✓ **Consider what services you need**
- ✓ **Obtain information from more than one service provider (services, experience with employee benefit plans, costs)**
- ✓ **For valid comparison, make sure each provider has same information**
- ✓ **Consider “bundled” and “unbundled” services**

## ■ **TIPS *continued***

- ✓ **If a license is required (attorney, accountant, etc.), check with state or federal licensing authorities to confirm provider has up-to-date license**
- ✓ **If handling plan assets, confirm provider is bonded**
- ✓ **Make sure you understand terms of agreements or contracts**

## ■ **TIPS *continued***

- ✓ **Document the process you followed in reviewing and selecting service providers**
- ✓ **Obtain commitment from provider for regular updates on services**
- ✓ **When renewing contracts with service providers – 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**

### **FIELD ASSISTANCE BULLETIN 2003-03**

- **Who can pay plan expenses?**
  - **Plan sponsor / participant**
- **How can fees and expenses be allocated among participants?**
  - **Pro rata / per capita**

## ■ FEES AND EXPENSES *continued*

- 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.

---

## **FEE AND INVESTMENT DISCLOSURES**

- **Disclosure Requirements**
- **Participant-Directed Plans  
Only**
- **Field Assistance Bulletin 2012-  
02R**

## **FEE AND INVESTMENT DISCLOSURES**

**What information must be disclosed?**

**“Plan-related information”**

- **General plan information**
- **Administrative expense information**
- **Individual expense information**

# FEE AND INVESTMENT DISCLOSURES

## What information must be disclosed?

### “Investment-related information”

- Performance data
- Benchmark returns
- Fee and expenses
- Internet website address
- Glossary

#### Model Comparative Chart

#### ABC Corporation 401k Retirement Plan Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact (insert name of plan administrator or designee) at (insert telephone number and address). A free paper copy of the information available on the Web site(s) can be obtained by contacting (insert name of plan administrator or designee) at (insert telephone number).

#### Document Summary

This document has 2 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

#### Part I. Performance Information

Table 1 focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site(s).

Table 1—Variable Return Investments								
Name/ Type of Option	Average Annual Total Return as of 12/31/XX				Benchmark			
	1yr.	5yr.	10yr.	Since	1yr.	5yr.	10yr.	Since

## **FEE AND INVESTMENT DISCLOSURES**

### **When must the information be disclosed?**

- **Up front**
- **Annually (2-month grace period available)**
- **Additional Information on request**

### **How must the information be disclosed?**

- **Comparative chart**
- **Model provided**

---

## ■ FEE AND INVESTMENT DISCLOSURES

Any other information?

“statement of expenses actually deducted”

Plan-related expenses

- Administrative expenses
- Individual expenses

At least quarterly

- May be included in the individual benefit statement

---

## ■ 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 **benefits** are available as promised under their Plan.



---

## PROHIBITED TRANSACTIONS

**REMEMBER** – if you're a decision-maker regarding a Plan, you are responsible to the Plan as a **Fiduciary**.



## **PROHIBITED TRANSACTIONS**

Under ERISA, a fiduciary may not:

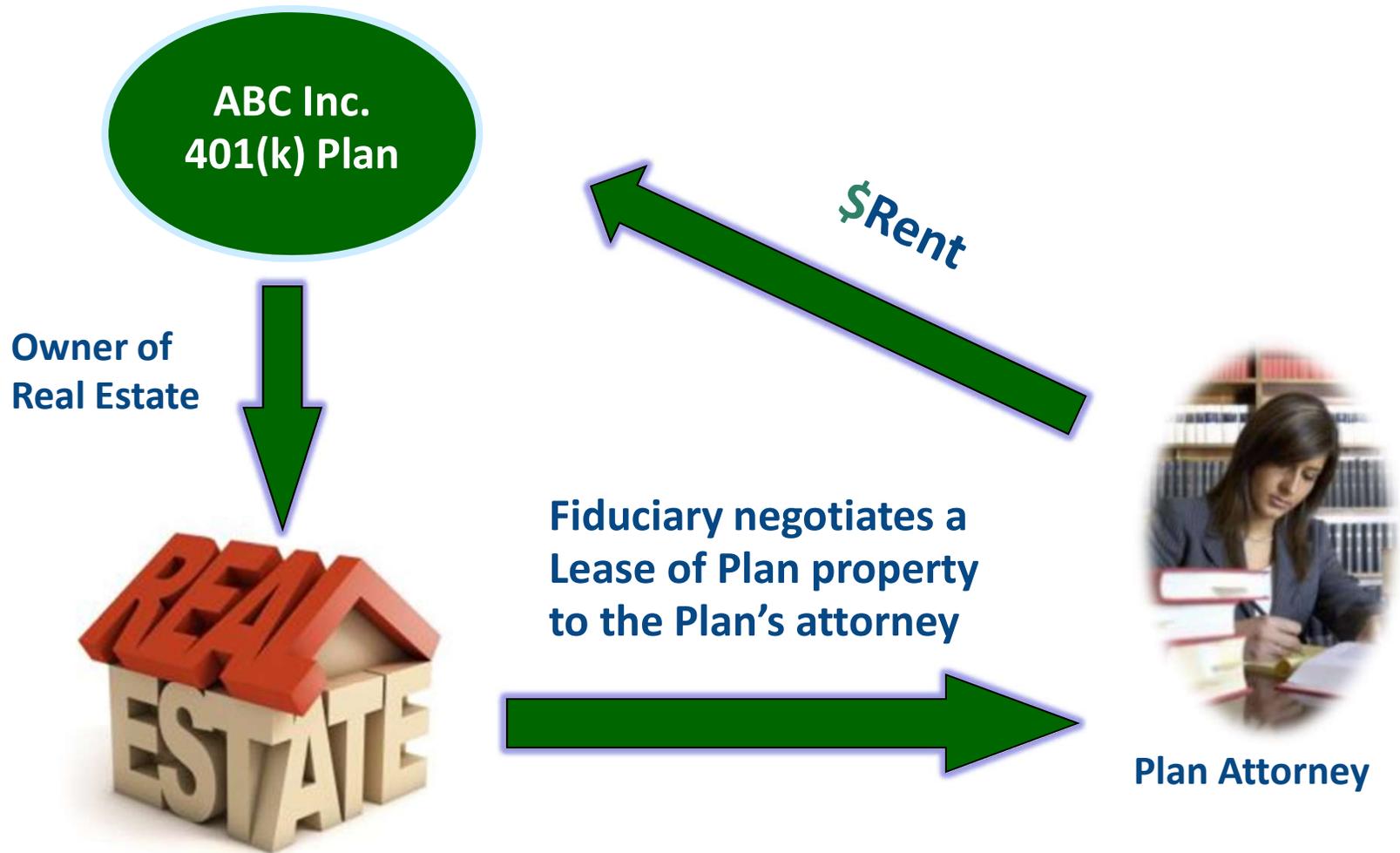
- **Cause the Plan to enter into a transaction, if he or she knows or should know that the transaction would be with a party in interest.**
- **Engage in any kind of fiduciary self-dealing with the plan's assets**

---

## ■ PROHIBITED TRANSACTIONS

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

# EXAMPLE



---

## ■ 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.**

## 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 OF STATUTORY EXEMPTION

### Service Provider Exemption-

### **ERISA section 408(b)(2)**

- 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.

## SERVICE PROVIDER EXEMPTION 408(B)(2): CONDITIONS

- Necessary service
- Reasonable compensation
- Reasonable contract:
  - as clarified in DOL final rule



## ■ FINAL RULE FOR THE SERVICE PROVIDER EXEMPTION: REASONABLE CONTRACT



The final rule relating to the Service Provider Exemption requires that certain service providers disclose specified detailed information to assist plan fiduciaries in assessing the reasonableness of contracts or arrangements.

---

## ■ OVERVIEW

- Reporting to DOL/IRS/PBGC
- Disclosures to participants and beneficiaries
- Recordkeeping requirements
- Bonding requirements

## ■ REPORTING TO THE GOVERNMENT

### The **Form 5500/Form 5500-SF** Annual Return/Report

- One Form satisfies DOL, IRS, PBGC
- Financial condition and general operation of the plan for the prior year
- Required information depends on type of plan and number of employees covered

## WHAT IS THE VFCP?

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



## **VFCP**

- **Covers 19 specific transactions and describes acceptable methods on 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 VFCP Coordinator in the EBSA Regional Office.**

---

## **EBSA CONTACT INFORMATION**

**J. Martin Shanahan**

**Group Supervisor**

**617/565-9609**