keeping trusts on track

DOL Proposed Fiduciary Regulation

A Session Specifically Designed for
The ITM TwentyFirst University

Thursday, February 11, 2016

Presented By:

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Alexander P. Ryan

Of Counsel, Groom Law Firm

W: groom.com

This course has been approved for 1 hour of Continuing Education for CTFA (Fiduciary) and CFP®

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DOL Proposed Fiduciary Regulation and Related Initiatives

Presented By: Alexander P. Ryan - Groom Law Group, Chartered

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Upcoming Webinars

Pre-acceptance Process for Unique and Hard to Value Assets
Richard Jacobs, President, PDS Services
Wednesday, February 17, 2016 at 2pm EST
Register Here

Self-Directed IRAs: Proceed with Caution and Confidence
Jean Meyer, President, Mainstar Trust – Formally: First Trust Company of Onaga (FTCO)
Tuesday, March 1, 2016 at 2pm EST
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Buying and Selling Specialty Assets
John Rowland, Portfolio Manager, PDS Services
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Developing a Compliant and Efficient Trust (ILIT) Administration Process
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Pitfalls of Operations/Management of Specialty Asset
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1 Hour CE credit for CFP and CTFA (Financial)

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The "conflicted advice" regulation packet

On April 14, 2015, the DOL made available its long-awaited re-proposed regulation on the definition of "fiduciary" under section 3(21) of ERISA and accompanying prohibited transaction exemptions.

http://www.dol.gov/ebsa/regs/conflictsofinterest.html

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Executive Summary

- The packet of materials proposed by the DOL included:
  - A regulation re-defining who is a "fiduciary" by reason of providing investment advice to a plan or an IRA;
  - Two new prohibited transaction class exemptions:
    - The Best Interest Contract Exemption;
    - The Principal Transaction in Debt Securities Exemption; and
  - Amendments to several existing prohibited transaction class exemptions.

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Executive Summary

- DOL received more than 2,600 comments on the proposed regulation and an additional 275 comments on the proposed exemptions.
- DOL also held public hearings on the proposals in August and reopened the comment period until September 24.
- Secretary Perez has said that the regulation and exemptions are the Agency's top priority between now and the end of the Administration.
- The final rule would generally become applicable eight months after publication of said final rule.

Current Rule	2010 Proposed Regulation	2015 Proposed Regulation
Types of Covered Advice: Recommendation on securities or other property. **Functional 5 Part Test**, applicable to any person: 1. Make investment recommendations on securities or other property; 2. On a regular basis; 3. Pursuant to a mutual understanding that the advice; 4. Will serve as a primary basis for investment decisions; and 5. Individualized to the particular needs of the plan.	**Types of Covered Advice**: 1. Advice, appraisal or fairness opinion concerning the value of securities or other property; 2. Investment recommendations on securities or other property; or 3. Advice or recommendations as to the management of securities or other property. **Per Se Fiduciaries**: Persons that provide Covered Advice if they or their affiliate fit in one of the following categories: 1. Acknowledge fiduciary status; 2. State or federally registered investment advisers; or 3. Discretionary fiduciary with respect to the plan. **Functional Test**: Applicable to persons who are not Per Se Fiduciaries, and replaces the 5 Part Test: 1. Provides advice or makes investment recommendations on securities or other property; 2. Pursuant to an understanding that the advice may be considered in connection with making investment decisions; and 3. Individualized to the needs of the recipient.	**Types of Covered Advice**: 1. Recommendations on securities or other property, including recommendation to take distribution and recommendation on rollover to another plan; 2. Recommendations on the management of securities or other property, including recommendation on the management of securities or other property to be rolled over or distributed; 3. Appraisal or fairness opinion, verbal or written, concerning value of securities or other property in connection with a specific transaction(s) involving plan; or 4. Recommendation of a person who provides advice in categories 1-3 above. **Per Se Fiduciaries**: Persons that provide Covered Advice if they or their affiliate acknowledge fiduciary status. **Functional Test**: Persons who directly or indirectly (through an affiliate): 1. Render advice; 2. Pursuant to written or verbal agreement or understanding; 3. Advice is: a. Individualized; or b. Specifically directed; 4. For consideration in making investment or management decisions. A "recommendation" is "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."

Illustration: Current State

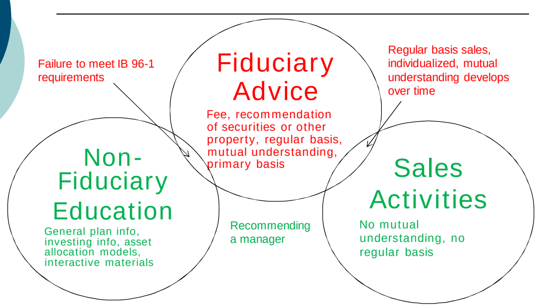
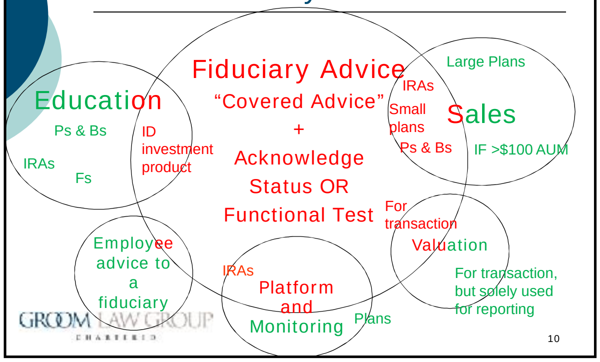


Illustration: Expansion of Fiduciary Definition



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Observations

- Rollovers recommendations will clearly be fiduciary.
  - See also FINRA Notice 13-45: Advising broker-dealers on their responsibilities concerning IRA Rollovers.
- Recommendation to stay in plan (i.e., not take a distribution) is fiduciary.
- Virtually all sales activity is fiduciary.
- Recommendations to hire oneself as a fee only investment adviser may be considered fiduciary.

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Fiduciary Status Carve-Outs

The seven carve-outs are:

- Seller's Carve-Out;
- Swap-Based Carve-Out;
- Employee Carve-Out;
- Platform Provider Carve-Out;
- Selection and Monitoring Assistance Carve-Out;
- Financial Reports and Valuations Carve-Out; and
- Investment Education Carve-Out.

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2010 Proposed Regulation	2015 Proposed Regulation
Education: Retains IB 96-1.	**Education:** Generally incorporates (but narrows - with regard to use of specifically identified investment alternatives in asset allocation models) IB 96-1 concepts and extends to IRAs.
ESOP Valuations: Includes valuation services as covered advice. But exception for valuations provided for ERISA & Code reporting.	**ESOP Valuations:** ESOP appraisals are carved out from appraisal advice. DOL states this will be addressed in separate guidance.
Seller's Exception: Requires that the "seller" demonstrate that the plan or participant knew or should know the person is acting in a sales capacity with adverse interest to the plan or participant or is not providing impartial investment advice.	**Counterparties:** Limited to: (1) large plan (100 or more participants) fiduciaries with financial expertise; or (2) to sophisticated fiduciaries with $100 MM under management. Requires understanding that impartial investment advice is not being provided. No fee can be received for the investment advice (as opposed to other services).
	Swap Transactions: Swap transactions with independent plan fiduciaries if in advance of the recommendations a written representation from the plan fiduciary states the fiduciary will not rely upon advice from the counterparty.
Platform Offering: Making available investment alternatives to a participant-directed plan if: (1) not individualized to plan, and (2) written disclosure is made to plan fiduciary that the person is not undertaking to provide impartial investment advice.	**Platform Offering:** Making available investment alternatives to a participant-directed plan if: (1) not individualized to plan, and (2) written disclosure is made to plan fiduciary that the person is not undertaking to provide impartial investment advice.
Investment Selection and Monitoring: The provision of general financial information to assist a plan fiduciary's selection or monitoring if disclosure in writing is made to the plan fiduciary that the person is not undertaking to provide impartial investment advice.	**Investment Selection and Monitoring:** In connection with the offering of a platform, the provision of information which (1) identifies alternatives that meet objective criteria set by the plan fiduciary or (2) provides objective financial data and comparisons with independent benchmarks.
Valuation and Reporting: Excluded valuations provided for purposes of compliance with the reporting and disclosure requirements of ERISA & Code, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries.	**Valuation and Reporting:** Exempts appraisals, fairness opinions in connection with (1) ESOPs, (2) CITs and pooled separate accounts (with more than a single unaffiliated plan investor), and (3) complying with ERISA or Code or other reporting requirements. Appraisals connected to specific transactions involving a plan are fiduciary.
	Employees: Employees providing advice to a plan fiduciary if no fee or compensation is received beyond normal compensation.
Execution: Retains existing exemption for brokers executing securities transaction pursuant to specific directions from the plan fiduciary without any input from the broker-dealer.	**Execution:** Retains existing exemption for brokers executing securities transaction pursuant to specific directions from the plan fiduciary without any input from the broker-dealer.

Seller's Carve-Out

The seller's carve-out allows a person:

- Acting as or on behalf of a counterparty;
- To provide covered advice to an independent plan fiduciary;
- In an arm's-length sale, purchase, loan or bilateral contract or proposal for such a transaction;
- If certain other conditions are met.

Seller's Carve-Out:
Plan Fiduciary Qualifications and Representations

With respect to plans represented by a fiduciary with responsibility for managing at least $100 million in employee benefit plan assets:

- The counterparty must confirm the fiduciary's "size" qualification by:
  - Relying on the plan's most recently filed Form 5500; or
  - Obtaining a written representation from the fiduciary regarding its assets under management.

Seller's Carve-Out:
Plan Fiduciary Qualifications and Representations

With respect to plans represented by a fiduciary with responsibility for managing less than $100 million in employee benefit plan assets but at least 100 participants:

- The counterparty must obtain a written representation from the plan fiduciary that:

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Seller's Carve-Out:
Plan Fiduciary Qualifications and Representations

- The fiduciary exercises authority and control with respect to the management and disposition of plan assets;
- The plan has 100 or more participants; and
- The fiduciary will not rely on the counterparty to:
  - Act in the best interest of the plan;
  - Provide impartial investment advice; or
  - Give advice in a fiduciary capacity.

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Seller's Carve-Out:
Required Disclosures and Other Compensation

The counterparty must:

- Inform the fiduciary representing the plan of the existence and nature of the person's financial interests in the transaction; and
- Reasonably believe that the fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants.

The counterparty may not:

- Receive any fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice (as opposed to other services) in connection with the transaction.

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Consumer Protection and Fragmentation

- The 2015 Proposal's "retail" / "institutional" distinction represents a new shift toward consumer protection.

Retail Investors	Institutional Investors
Participants and Beneficiaries	Large Plans (>100 Ps)
IRA Owners	Plans managed by investment manager with more than $100 million AUM
Small Plans (<100 Ps)	

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Platform Provider Carve-Out

- The proposed regulation carves out from fiduciary status a person who merely markets and makes available to an employee benefit plan securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives.
- The platform provider must acknowledge, in writing, that it is not providing investment advice to the plan.

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Platform Provider Carve-Out

- The securities or other property offered through the platform must be made available without regard to the individualized needs of the plan, its participants, or beneficiaries.
- The platform can provide limited information about the offerings on the platform.
- Does not apply to IRA platform.

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Investment Education Carve-Out

- DOL also attempted to exclude from the definition of fiduciary advice the provision of investment education.
- The carve-out would supersede and replace the commonly used Interpretive Bulletin 96-1 (29 CFR 2509.96-1).
- While DOL's investment education carve-out largely mirrors the provisions of IB 96-1; DOL added several new conditions that will need to be worked through.

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Investment Education Carve-Out

- DOL added a new condition that the information and materials provided not include advice or recommendations regarding:
  - Specific investment products;
  - Specific investment managers; or
  - The value of particular securities or other property.
- The carve-out also specifically permits the furnishing of information to help participants assess their retirement needs past retirement and risks.

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New PTE: "Best Interest Contract" Exemption

- What is covered?
  - Receipt of compensation in connection with a purchase, sale or holding of an "Asset."
- Who may receive compensation?
  - Advisers
  - Financial Institutions
  - Affiliates and Related Entities of the above.
- To whom may advice be given?
  - "Retirement Investors"

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Retirement Investors

- Includes:
  - Participant or beneficiary in participant-directed plan;
  - The beneficial owner of an IRA/HSAs; and
  - A plan sponsor of a non-participant-directed plan that has fewer than 100 participants.
- Does not include:
  - Plan sponsors of participant-directed plans.

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Advice & Assets

- Applies to advice programs
  - Does not cover discretionary programs.
  - Need to find another exemption.
- Applies to "Assets"
  - Includes common investments: publicly-traded equity and debt, MFs, ETFs, etc. (in general publicly traded, market determined value).
  - Excludes: future or put, call, straddle, or any other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.

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Compensation

- Exempts "otherwise prohibited compensation."
  - Compensation that varies based on investment recommendations.
  - Compensation from third parties in connection with their advice.
- Implicitly, includes commissions, revenue sharing, 12b-1 fees, sub-TA fees, shareholder servicing, marketing support payments, & other compensation.
  - However, examples provided by the DOL call into question how and whether such compensation may be retained.
- Proprietary products

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Exclusions

- Adviser, Financial Institution or Affiliate is the employer of employees covered by the plan;
- Adviser or Financial Institution is a named fiduciary or plan administrator with respect to an ERISA plan;
- Principal transactions; and
- Computer generated advice ("Robo advice").

Conditions of Exemption

- Written contract - prior to advice.
- Acknowledge fiduciary status.
- Commit to adhere to "Impartial Conduct Standards."
  - Reasonable comp & no misleading statements.
- Commit to provide advice in "Best Interest":
  - "Act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the Retirement Investor without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party."

Conditions of Exemption

- Provide certain warranties
  - Comply with all applicable federal and state laws (bootstrapping of claims).
  - Adopt written policies and procedures:
    - Reasonably designed to mitigate the impact of material conflicts of interest; and
    - Ensure that Advisers adhere to the Impartial Conduct Standards.

Conditions of Exemption

- Other Contractual Disclosures:
  - Material conflicts of interest.
  - Right to obtain complete information about all of the fees.
  - Offering of proprietary products or receives third party payments.
- Contract must not contain:
  - Exculpatory provision related to violations of the contract's terms; or
  - Waiver or qualification regarding right to bring or participate in a class action.
- Additional Disclosures
  - See below

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Policies & Procedures

- In formulating policies and procedures:
  - Specifically identify material conflicts of interest and adopt measures to mitigate; and
  - Avoid use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage Advisers to make recommendations that are not in the best interest of Retirement Investors.

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Additional Disclosures

- Public website
  - Direct and indirect material compensation within the last 365 days;
  - Source of the compensation; and
  - How the compensation varies within and among Asset classes.
- Point of Sale
  - All-in cost and anticipated future costs (sample chart).
  - "Total cost" to the Retirement Investor for 1-, 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser, and reasonable assumptions about investment performance, which must be disclosed.
  - Additional conditions apply if a Financial Institution limits the investment products a Retirement Investor may purchase, sell or hold.

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Additional Disclosures

- Annual Disclosure
  - A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold;
  - Total dollar amount of all fees and expenses paid by the Retirement Investor, both directly and indirectly, with respect to each Asset; and
  - Total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held.

DOL Requirements

- Disclose to DOL reliance on BIC.
- The Financial Institution must maintain and, upon request, disclose to DOL information related to "Inflows," "Outflows," "Holdings," and "Returns."

Potential Sources of Liability for Advice Fiduciaries

Advice fiduciaries who fail to comply with the terms of the exemption may incur:

- Contractual liability to IRA owners;
- Liability under ERISA §§ 502(a)(2) and (3) to plans, plan participants, and beneficiaries.
  - Note: The DOL also states, "Additionally, plans, participants and beneficiaries could enforce their obligations in an action based on breach of the agreement." 80 Fed. Reg. 21972. This could allow for state law claims.

Changes to Current Exemptions

- PTE 84-24
- PTE 86-128
- PTE 75-1, Part II

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PTE 84-24

- PTE 84-24 generally currently provides ERISA section 406(a)(1)(A)–(D) and 406(b) relief for the purchase and sale of mutual fund shares and insurance contracts to an ERISA covered plan and the receipt of commissions by an agent, broker or pension consultant in connection with the purchase of mutual fund shares or insurance contracts.
- The DOL significantly narrowed the definition of the term "commissions" (excluding 12b-1 fees, revenue sharing, and other third party payments). Such payments would no longer be exempt under the revised exemptions.
- DOL included the best interest/Impartial Conduct Standard as a condition of the exemption. The exemption will also require the adoption of some form of the best interest standard.
- The DOL also proposed changing PTE 84-24 to no longer cover advice to an IRA holder regarding the purchase or sale of an annuity contract that is a security (e.g., a variable annuity contracts) and regarding the purchase and sale of mutual fund shares by IRAs.
- These transactions involving IRAs must now obtain relief through the BIC.

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PTE 86-128

- PTE 86-128 provides an exemption for transactions prohibited under ERISA section 406(b) that arise by reason of the fiduciary's use of its authority to cause a plan to pay a fee for effecting or executing securities transactions to itself or an affiliated broker-dealer.
- Like under PTE 84-24, the DOL proposes to significantly narrow the definition of "commissions" covered by PTE 86-128.
- DOL included the best interest/Impartial Conduct Standard as a condition of the exemption. The exemption will also require the adoption of some form of the best interest standard.
- DOL also proposed to subject IRAs to the full scope of that exemption's reporting and recordkeeping conditions, which currently only apply to ERISA-governed plans.

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PTE 75-1, Part II

- The DOL also proposes to eliminate PTE 75-1, Part II into PTE 86-128. PTE 75-1, Part II currently provides ERISA section 406(a)(1)(D) and 406(b) relief for a plan's purchase of mutual fund shares from the fiduciary, acting as principal, and for the receipt of a commission by the fiduciary.
- Many brokers interpret PTE 75-1, Part II to provide exemptive relief for agency transactions involving mutual fund shares. However, the DOL now proposes to amend that exemption in such a way that it cannot be used for agency transactions.
- The definition of "commission" will also be narrowed.

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Questions?

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About ITM TwentyFirst University

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ITM TwentyFirst University was created to provide those individuals working with personal trusts and TOLI trusts a source of vital information to utilize in their practice. The course topics will include real life case studies that can be applied to day to day situations. Subject matter is designed to help Advisors provide better guidance and assistance to clients. Our faculty consists of sought after presenters who are experts in their related fields. The courses are offered for free and will carry Continuing Education (CE) credits. *See specific courses for CE listings.*

2016 Course Schedule - Free CFP® & CTFA CE Credits

Pre-acceptance Process for Unique and Hard to Value Assets

Richard Jacobs, President, PDS Services
Wednesday, February 17, 2016 at 2pm EST
• 1-HR CE For CFP® & CTFA (Financial Planning)

Register Here

This session, focused on the pre-acceptance process for Hard to Value Assets, will provide a definition of "pre-acceptance" in the fiduciary context, a survey of the rationale behind the process, a summary of a standard approach and an overview of idiosyncrasies' for pre-acceptance for each asset class in the Unique and Hard to Value Asset category: real estate, notes/mortgages, minerals, and closely held businesses.

Self-Directed IRAs: Proceed with Caution and Confidence

Mainstar Trust

Jean Meyer, President, Mainstar Trust
– Formally: First Trust Company of Onaga (FTCO)
Tuesday, March 1, 2016 at 2pm EST
• 1-HR CE For CFP® & CTFA (Financial Planning)

Register Here

Self-directed IRA's have become one of the nation's retirement essentials. Understanding how to administer them is a hot topic among Advisor's and Trustee's. Managing and administering this asset can be tricky, but with the information in this session you will be able to move ahead with confidence. This is a session many have asked for and we are lucky to have an expert in Self-Directed IRA's leading it.

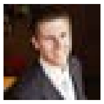
Buying and Selling Specialty Assets

John Rowland, Portfolio Manager, PDS Services
Wednesday, March 16, 2016 at 2pm EST
• 1-HR CE For CFP® & CTFA (Financial Planning)

Register Here

This webinar will explore when is the right time and method to sell a specialty asset and what types of special assets to buy to increase cash flow. It will also discuss how to prudently invest the trust property to make it productive for the beneficiaries and when an asset becomes a cash liability rather than a viable money making asset for the trust.

Developing a Compliant and Efficient Trust (ILIT) Administration Process



Jason Hassman, Client Relationship Manager, ITM Twenty First
Thursday, March 31, 2016 at 2pm EST
• 1-HR CE For CFP® & CTFA (Financial Planning)

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Putting an efficient and compliant process around the administration of personal trusts is no easy task. But with logical procedures to follow the task becomes much easier. This session will provide the Trustee or Advisor with the actual process developed and proven for personal trusts, with an emphasis on life insurance trusts, one of the more complex trusts to administer. The session, delivered by a specialist in personal trusts, will provide the framework for success for those professionals working in this market.

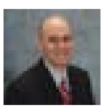
Pitfalls of Operations/Management of Specialty Asset

Kip West, Chief Operations Officer, Brenda Trevino, Operations Manager, Brett Helweg, Portfolio Manager, PDS Services
Wednesday, April 20, 2016 at 2pm EST
• 1-HR CE For CFP® & CTFA (Financial Planning)

Register Here

Unlike some asset classes, specialty assets can be a major headache for the operations and administrative staff of any fiduciary organization who does not have a separate special assets division or outside service provider. This webinar explores the pitfalls and handling of unique situations the assets create including revenue/expense processing, valuations, tracking timed events and ensuring all the boxes are checking according to your compliance requirements.

Beyond Ratings: An Alternative Approach to Analyzing Life Insurance Financial Strength



David Paul, Principal, ALIRT Insurance Research
Wednesday, May 4, 2016 at 2pm EST
• 1-HR CE For CFP® & CTFA (Financial Planning)

Register Here

Trustees and advisors need to better understand the financial strength of life insurance carriers in this low interest rate environment we are in. The market crash of 2007 and the quick credit worthiness drop of AIG pointed out this lesson to all. Past life insurance debacles, like Executive Life and the more current struggles of Phoenix Life and Conseco have shined a light on carrier financials strength as an area that Trustees and Advisor's should be aware of. This session will provide the professional with a much greater understanding of gauging carrier financial strength and provide an insight inside carrier financials that, to this point, probably was not seen or understood.

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Meet The ITM TwentyFirst University Faculty Team

Jason Hassman - ITM | TwentyFirst

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TOLI Policy Management

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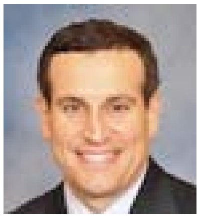
TOLI Policy Management



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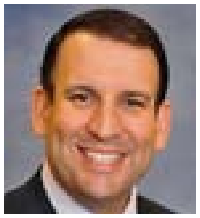
Life Settlement,Longevity, and Secondary Market Valuation (SMV®) Specialists



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Trust Practices and Consulting

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Best Practices Standards for Life Insurance Stewards

Don Trone, GFS - 3ethos

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Leadership, Stewardship and Governance (Fiduciary Responsibility)

Brad Davidson - Spardata/Unique Asset Partners

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Hard to Value Asset Valuation and Consulting

Richard W. Jacobs - PDS Services, Inc.

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Hard to Value Asset Management & Recordkeeping

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