
Via email: e-ORI@dol.gov
Subject: RIN 1210-AB32

July 21, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement Investment Advice RIN 1210-AB32

Ladies and Gentlemen:

Duff & Phelps appreciates the opportunity to comment on the Department of Labor's ("Department") notice of proposed rulemaking comprising an amendment to the regulation defining "investment advice" under section 3(21) of the Employee Retirement Income Security Act, as amended ("ERISA") (the "Proposal") and under section 4975(e)(3) of the Internal Revenue Code of 1986, as amended (the "Code").

Who Are We?

Duff & Phelps is the premier global valuation and corporate finance advisor with expertise in complex valuation, dispute and legal management consulting, mergers and acquisitions ("M&A"), restructuring, and compliance and regulatory consulting.

Since 1932, clients have relied on Duff & Phelps for objective advice that addresses their most complex business needs. We serve publicly traded and privately held companies, law firms, government entities and investment organizations such as private equity firms and hedge funds. We also advise the world's leading standard setting bodies on valuation issues and best practices.

Duff & Phelps advises boards of directors, special committees, trustees and other fiduciaries, including ERISA fiduciaries, on fairness issues in a variety of corporate transactions. In addition to providing fairness opinions on merger and acquisition transactions, we are experts in opining on transactions absent a market-clearing mechanism.

Representative situations include:

Sell-side/buy-side mergers & acquisitions;

- Spin-offs, split-ups, divestitures;
- Going-private transactions;
- Related-party transactions;
- Down-round financing, minority investments, and other financing transactions;
- Requirements pursuant to certain bond indentures and credit agreements;
- Any transaction requiring a shareholder vote; and
- ESOP/ERISA transactions

In our Alternative Asset Advisory practice, Duff & Phelps specializes in assisting clients with the valuation of alternative investments, specifically securities and positions for which there are no "active market" quotations. The firm also advises on valuation policy best practices. For example, our values are used for to determine net asset values reported to private equity fund and hedge fund partners and to provide liquidity to investors.

We recently acquired American Appraisal, greatly expanding our real estate and fixed asset valuation services. In our real estate practice, Duff & Phelps professionals provide valuable support to clients in connection with acquisitions, dispositions, and financings, enabling clients to make important business decisions with confidence. Clients include companies and fiduciaries that require real estate portfolio valuations for pension funds, other real estate funds, and individuals.

Overview of Proposal:

We recognize the Department's attempt to define "investment advice" more narrowly so that the provision of "an appraisal, fairness opinion, or similar statement . . . concerning the value of securities or other property" would be "investment advice" only if such appraisal, opinion, or similar statement "is provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA." The Department also provides for "carve outs" related to the provision of appraisals,

fairness opinions, or statements of value in certain circumstances. These changes reflect some of the comments the Department received in reaction to its prior proposal to re-define "investment advice."

Notwithstanding the Department's efforts, Duff & Phelps believes that it is inappropriate to apply ERISA's fiduciary duty provisions to the provider of a valuation, fairness opinion, or similar statement to a plan fiduciary under any circumstance. Rather, consistent with current law, valuation and fairness opinion providers should be treated as non-fiduciary service providers. Such providers simply provide information that enables a plan fiduciary with the

authority to make decisions on behalf of a plan (the "Fiduciary") to consider valuation and fairness, among the numerous material factors considered, in making plan transaction decisions. This should be the case for the following reasons: (i) providing a valuation or fairness opinion is in no way comparable to any common sense understanding of the term "investment advice," (ii) ERISA's fiduciary duty provisions, particularly the co-fiduciary liability provisions, will require such providers to second guess the deciding fiduciary's actions in a way that is inconsistent with the objective role of a valuation and fairness opinion provider; and (iii) a valuation and fairness opinion provider is often not even aware of the various ways a Fiduciary uses the valuation or fairness opinion we provide.

We have long recognized that the decisions made by fiduciaries—both ERISA and non-ERISA fiduciaries—involve many more considerations than we review in a valuation or fairness opinion. We are not a registered investment advisor. As a result, we currently include the following language in our opinion letters:

This Opinion is furnished solely for the use and benefit of the [Board of Directors/ Trustee] in connection with its consideration of the Proposed Transaction and is not intended to, and does not, confer any rights or remedies upon any other person, and is not intended to be used, and may not be used, by any other person or for any other purpose, without Duff & Phelps' express consent. This Opinion (i) does not address the merits of the underlying business decision to enter into the Proposed Transaction versus any alternative strategy or transaction; (ii) does not address any transaction related to the Proposed Transaction; (iii) is not a recommendation as to how the [Board of Directors/ Trustee or any Plan participant] should vote or act with respect to any matters relating to the Proposed Transaction, or whether to proceed with the Proposed Transaction or any related transaction, and (iv) does not indicate that the consideration [paid / received] is the best possibly attainable under any circumstances; instead, it merely states whether the consideration in the Proposed Transaction is within a range suggested by certain financial analyses. The decision as to whether to proceed with the Proposed Transaction or any related transaction may depend on an assessment of factors unrelated to the financial analysis on which this Opinion is based. This letter should not be construed as creating any fiduciary duty on the part of Duff & Phelps to any party.

Many of our engagement letters, particularly those for ERISA-covered plans, say:

The [Company/ Trustee] acknowledge[s] and agree[s] that Duff & Phelps is not and shall not be construed as a fiduciary of the Company [or the Plan] and shall have no duties or liabilities to the equity holders or creditors of the Company or any other person by virtue of this Agreement or the engagement hereunder, all of which are hereby expressly waived. The [Company/ and the Trustee] further acknowledge[s] and agree[s] that the Opinion does not constitute investment advice.

Concerns Raised by Department's Proposal:

Duff & Phelps does not act in the nature of an investment advice provider when it values an asset or a security for a Fiduciary. We do not recommend how a Fiduciary should act. The Fiduciary to which the valuation or fairness opinion is provided has the decision-making authority (i) to acquire, hold, dispose of or exchange securities or other property of the plan or IRA and (ii) to manage securities or other property of the plan.

In our view, an investment advice provider who acts as a fiduciary for purposes of ERISA and the Code plays a critical, but completely different role than a valuation or fairness opinion provider. The investment advice provider considers whether, based upon the facts and circumstances then prevailing, the acquisition, holding, disposition, exchange, or management decisions involving securities or other property would be prudent, in the best interests of the plan participants and beneficiaries, and otherwise compliant with ERISA's fiduciary duty requirements. The advice provider then makes a recommendation to the Fiduciary with regard to the subject transaction.

On the other hand, valuation and fairness opinion providers give information to the Fiduciary enabling it to meet its fiduciary obligations. Valuation providers do not participate in the fiduciary decision-making process. Our valuation or opinion is independent of our clients' specific circumstances, and is the same regardless of to whom it is provided—a Fiduciary, a board of directors, a company, a fund, a government entity, a U.S. resident, a foreign national. In fact, we do not have much of the necessary information that an investment advice provider or Fiduciary would use to recommend or decide whether a plan should or should not take action. We often do not know the criteria a Fiduciary uses. We are sometimes unaware of decisions a Fiduciary makes (for example, if a Fiduciary chooses to liquidate a fund investment, or sell a property, for which we have provided a valuation). Rather, we provide a valuation or fairness opinion, which is only one factor among a number of factors that the Fiduciary considers. Such factors (e.g., plan portfolio liquidity needs, plan portfolio diversification concerns, time horizon) are numerous and require knowledge and expertise that valuation and fairness opinion providers simply do not have and do not need to perform their functions. We cannot control, nor would we wish to control, a Fiduciary's actions. We believe that the Fiduciary should be free to exercise its discretion as it believes appropriate.

In addition, because determinations of fair market value are not precise, Duff & Phelps often prepares a range of reasonable market values for a security or asset that is the subject of an anticipated transaction. The Fiduciary ultimately is responsible for making a determination as to where in the range to transact, whether to accept the valuation or fairness opinion, the timing of the transaction and, possibly, to act on a value outside of the range. Often, a transaction has already been struck prior to our retention, and we solely provide an analysis

of price and terms that a Fiduciary may use when deciding whether to participate. We are not in a position to challenge the transaction price and terms because the Fiduciary's decisions may be based upon circumstances that are unknown to us.

We point out timing for a very important reason. Most valuations are done after the valuation date. For example, a valuation of an asset as of December 31 is provided on a later date, possibly months later. In our reading of the rule, it is unclear whether we have fiduciary liability for the valuation or fairness opinion in the event the Fiduciary takes action on it even though time has passed and the valuation or fairness opinion may be stale.

If the Department makes valuation and fairness opinion providers fiduciaries, we will be put in the untenable position of shadowing Fiduciary decision-making and potentially second-guessing, and being jointly and severally liable for, how the Fiduciary uses the valuation or fairness opinion. Otherwise, we will be vulnerable to suits brought under ERISA section 405(a)(3) for breach of co-fiduciary duty (e.g., Duff & Phelps had knowledge of a breach by the other fiduciary yet took no reasonable efforts under the circumstances to remedy the breach). We note that it is far from clear whether an "actual knowledge" (i.e., know of the breach) or "constructive knowledge" (i.e., should have known about the breach) standard applies under section 405(a)(3). Therefore, if we were to continue to provide valuations or fairness opinions to plans, we will be put in the position of (1) formally vetting our clients' processes and procedures, and financial wherewithal to weather challenges and (2) requiring information of the decisions and asking the fiduciary the basis for its decisions, possibly even before issuing our valuation or opinion. We are not in a position to do this. Further, we believe this will have a stifling effect on our clients' abilities to operate, report to investors, and complete the transactions necessary to manage and operate plans.

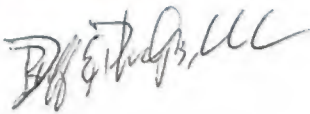
Finally, sometimes we may not even be aware that we are providing advice to a Fiduciary. We understand that certain fund managers or company officers or boards who may retain us may have fiduciary duties to a plan pursuant to ERISA (for example, in a fund where the assets of the fund are considered "plan assets" or a Board of Directors that is both a fiduciary to a company's shareholders and a plan). If we are retained by a fund, will it be incumbent on us to investigate, or make a determination, as to whether our potential client is a fiduciary before accepting the assignment? We are almost never aware of who a fund's investors are, whether they are ERISA plans, and how much of the fund is represented by ERISA plans. In a fairness opinion to the Board of Directors of a company who will make a decision on behalf of the corporation, we do not inquire as to the other roles Board members may have. Given our limited role in the Fiduciary's decision-making process, valuation and fairness opinion providers should not be put in the position of making these inquiries, attempting to address these concerns through "carve-outs" proposed by the Department, or interpreting the meaning of the language in the Department's definition of "investment advice."

Recommendation:

Based upon the foregoing, we strongly urge the Department to conclude that "an appraisal, fairness opinion, or similar statement...concerning the value of securities or other property" is not "investment advice" for purposes of ERISA or the Code. Rather, as is the case today, the valuation and fairness opinion providers should be non-fiduciary service providers to plan fiduciaries who will consider the valuation or fairness opinion in addition to other important information available to them to make decisions in connection the securities or other property held by plans.

We appreciate the opportunity to provide comment to the Department. We also look forward to providing additional comments after the Department conducts a public hearing on the Proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "D. E. [unclear] LLC". The signature is written in a cursive, somewhat stylized font.