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September 24, 2015

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

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:

In light of the testimony received by the Department of Labor (“Department”) in public hearings held from August 10 through August 13, 2015 and statements made by Department officials during that testimony, our client, Duff & Phelps, appreciates the opportunity to provide additional comments to the Department on its 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”).

Duff & Phelps submitted its initial comments on July 21, 2015. We reaffirm those comments. However, we wish to reinforce certain proposed changes that we strongly believe should be addressed in the final regulation. Specifically, the provision of a fairness opinion or appraisal should not in any circumstance be included under the definition of “investment advice” in the Department’s final regulation. In addition, clarification regarding certain limitations and the “carve outs” included in the Proposal is necessary. The Department’s failure to take such action will result in an unnecessary increase in the costs of providing these services to ERISA-governed plans and will reduce the number of firms that are willing to provide appraisals and fairness opinions to ERISA-governed plans.

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The Provision of an Appraisal or Fairness Opinion Should Not Be Investment Advice

The provision of an appraisal or a fairness opinion should not be “investment advice” for purposes of ERISA or the Code because the firm that provides a fairness opinion or appraisal does not tell the fiduciary what course of action he or she should take with respect to a transaction involving a security or other property. The firm only provides information that may be used by the discretionary fiduciary to make an informed decision in his or her exercise of fiduciary discretion. This is not the same as when a party, e.g., an investment adviser, recommends one or more investments in securities. We believe the provision of this kind of information to a fiduciary is not fiduciary conduct as contemplated under the ERISA statute, while a recommendation regarding how a fiduciary should act with regard to the purchase or sale of a security is intended to be fiduciary conduct governed by ERISA. Mr. Tarbell, testifying on behalf of the American Society of Appraisers, echoed this point.

For example, the named fiduciary of a defined contribution plan may hire a registered investment adviser to recommend an investment fund line up for the plan. In so doing, the adviser may recommend that a named fiduciary include a large cap value mutual fund in the plan and, subsequently, may recommend three large cap value funds out of all of the large cap value funds in the marketplace. The named fiduciary may choose to include in the plan a large cap value fund (or not) and may choose one of the three recommended large cap value funds (or not). The investment adviser is not ultimately responsible for the decision as long as he or she made recommendations in accordance with the fiduciary duty provisions and does not have a duty to act on the recommendation under ERISA’s co-fiduciary duty provisions. However, the investment adviser gives advice regarding how the fiduciary should act for purposes of establishing the plan’s fund line up. Duff & Phelps believes such a recommendation exemplifies the kind of conduct intended to be subject to ERISA’s fiduciary duty provisions.

On the other hand, a provider of an appraisal or fairness opinion does not tell the named fiduciary how it “should” act with regard to a transaction. Rather, the provider gives the fiduciary information it needs to make an informed fiduciary decision. Therefore, while we agree with Mr. Hauser’s statements that providers use their “expert judgment” and perform a “whole host of calculations, assumptions, and expert judgment calls about what the asset is going to trade at,”¹ the nature of such activity is distinct from advising a fiduciary on how it should act. In our view, Congress did not intend that ERISA’s fiduciary duty requirements govern the provision of information utilized by the plan fiduciary to make a decision with respect to a specific transaction involving securities or other property, regardless of the level of expertise and mathematics required to provide such information.

Additionally, we disagree with witness statements made on behalf of the Appraisal Institute during the hearings. The witness distinguished appraisals from fairness opinions. In the

¹ Aug. 13 Tr. at 1153–54.

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case of an appraisal, the witness testified that an appraiser only provides a statement of value or a range of values. On the other hand, according to the witness, a fairness opinion, which includes a determination of fair value, i.e., an appraisal, “represents the work an investment manager might perform as a third party.”² Therefore, the witness believes that appraisals should not be included as fiduciary investment advice in the final regulation, but the clear suggestion is that fairness opinions should be included. We do not agree.

In our view, a determination as to whether a transaction is “fair” is effectively no different than an appraisal because, in both cases, the provider gives information to the discretionary fiduciary that enables the fiduciary to make a decision. However, in neither case does the provider attempt to advise the fiduciary regarding which course of action should be taken. In fact, the course of action ultimately decided by the named fiduciary may involve factors of which a provider of an appraisal or fairness opinion may not be aware, e.g., the liquidity or diversification needs of the plan. Therefore, Duff & Phelps believes that the provision of either a fairness opinion or appraisal should not result in fiduciary status.

Based upon the foregoing, Duff & Phelps believes that the provision of a fairness opinion or appraisal should not be included in the definition of investment advice in the Department’s final regulation.

There Is No Reasonable Policy Rationale for Treating ESOP Fairness Opinions and Appraisals Differently from Other Fairness Opinions and Appraisals Provided to Plans

While we do not agree that the provision of a fairness opinion or appraisal should be considered fiduciary conduct for purposes of ERISA and the Code, Duff & Phelps agrees with the Department’s determination to address Employee Stock Ownership Plan (“ESOP”) transactions in a separate rulemaking. However, consistent with the Appraisal Society of America’s position in its testimony to the Department, we do not believe there is any rational basis for addressing fairness opinions and appraisals given in connection with ESOP transactions as part of a separate rulemaking, while specific transactions involving employer stock in connection with any other plan, or specific transactions involving any other type of securities or other property in connection with any plan are addressed under the Department’s final “investment advice” regulation. Duff & Phelps believes that all fairness opinions and appraisals should be treated consistently under a single rulemaking effort. If the Department chooses to do otherwise, Duff & Phelps will eventually be required to operate under two separate compliance regimes, one applicable to ESOP transactions and the other applicable to other plan transactions. This will only increase compliance costs without any demonstrable benefit to plan participants and beneficiaries.

² Aug. 13 Tr. at 1209.

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Duff & Phelps' performance of a fairness opinion or appraisal in connection with a transaction involving employer securities is fundamentally the same whether the plan at issue is an ESOP or any other plan. However, as proposed, the Department intends that the transaction involving the ESOP will be subject to one set of regulations, while a non-ESOP defined contribution plan or defined benefit plan will be subject to the "investment advice" definition under a final regulation promulgated by the Department under ERISA section 3(21). We do not believe this separate treatment is necessary or appropriate.

Similarly, Duff & Phelps believes that there is no good reason to subject transactions involving employer securities to a regulatory scheme different from transactions involving other securities or property. In our experience, the types of transactions involving employee benefit plans typically involve real estate when employer securities are not the subject of the transaction. The analysis of real estate is fundamentally different from analyzing the value of a business to determine their respective fair market values. However, we believe that the principles that apply for purposes of determining whether the appraisal is performed appropriately for purposes of ERISA and the Code should be consistent across all types of securities and property. Otherwise, firms like Duff & Phelps will be subject to two separate regulatory regimes, thus incurring additional compliance costs, without any corresponding benefits to plan participants and beneficiaries.

Therefore, to the extent the Department believes additional regulation of fairness opinion and appraisal providers in connection with specific transactions is necessary, Duff & Phelps asks that the Department address the obligations of such providers in a single rulemaking that also addresses ESOP transactions.

The Requirements of ERISA Fiduciary Status will Conflict with an Appraiser's Obligations under the Code and Applicable Professional Conduct Standards

According to the preamble to the Proposal and the statement of Department officials at the hearing, the Department does not accept the concern of Duff & Phelps and others that subjecting a provider of a fairness opinion or appraisal to an ERISA fiduciary standard will conflict with applicable professional conduct standards. However, we believe the Department's statements have not considered how the provider can comply with ERISA and its obligation to remain neutral under applicable professional conduct standards.

ERISA section 404(a)(1)(A) requires that a fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." Additionally, ERISA section 406(b)(2) provides that "[a] fiduciary with respect to a plan shall not . . . in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." In other words, a fiduciary is prohibited from acting on behalf of two

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counterparties on opposite sides of a transaction. The provisions are based on the premise that a fiduciary cannot meet his or her duty of undivided loyalty to the plan when he or she acts on both sides of a transaction.

The Department states in the preamble to the Proposal that there is no conflict between the requirement to act in the best interest of a plan and its participants and its duty under applicable professional conduct standards to act impartially. Rather, the Department states “An appraiser complies with his or her obligations as an appraiser—and as a loyal fiduciary—by giving plan fiduciaries or participants an impartial and accurate assessment of the value of an asset in accordance with appraisers’ professional standard of care. Nothing in ERISA or this regulation should be read as compelling an appraiser to slant valuation opinions to reflect what the plan wishes the asset were worth rather than what it is really worth.”³ During the hearing, Mr. Hauser stated that the Department may be willing to clarify that the duty of loyalty in the circumstances of providing an appraisal only requires an appraiser’s “impartial best judgment of what the right price is.”⁴

Duff & Phelps is concerned that notwithstanding any efforts by the Department to narrowly define the fiduciary responsibilities of a provider of a fairness opinion or appraisal (versus other fiduciaries) within the preamble, it nonetheless will be subject to either (i) claims that it violated its fiduciary duty to the plan for which it provided the opinion or appraisal or (ii) discipline for failing to meet the appraisal standards applicable to it under self-regulatory regimes. Simply put, Duff & Phelps will be put in an untenable position.

Our concern is that, notwithstanding the efforts by the Department to clarify the extent to which an appraiser is subject to the fiduciary duty and prohibited transaction provisions, ERISA can be interpreted to require Duff & Phelps to act as an advocate on behalf of the plan by the fiduciary. Otherwise, the duty of loyalty under section 404(a)(1)(A) and the conflict of interest prohibition under section 406(b)(2) would not be adequately protective of the plan. If the standard applicable to the appraisal or fairness opinion provider only requires it to act impartially in its calculation of the “right price” in accordance with its “professional standard of care,” as suggested by the Department, the provider should be able to act on either side of the transaction because it simply determines an appropriate value between a willing buyer and willing seller. Acting on both sides of the transaction, of course, is not possible under sections 404(a)(1)(A) and 406(b)(2). Rather, the obligation of the provider who is a fiduciary is to determine the “right price” *for the plan* that he or she acts as a fiduciary. Therefore, inherently, ERISA requires the provider to advocate for or negotiate on behalf of the plan.⁵ This may require Duff & Phelps to

³ Proposal, 80 Fed. Reg. 21928, 21940 (Apr. 20, 2015).

⁴ Aug. 13 Tr. at 1153.

⁵ Cutaiar v. Marshall, 590 F.2d. 523 (3rd Cir. 1978) (“Each plan must be represented by trustees who are free to exert the maximum economic power manifested by their fund whenever they are negotiating a commercial transaction.”); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 639 (W.D. Wis. 1979) (quoting Meinhard v.

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determine a price that is in the best interests of the plan, e.g., a lower price in the case of a purchase or a higher price in the case of a sale, rather than the price a reasonable buyer would purchase or a reasonable seller would sell the security or other property. In the event Duff & Phelps does not do so, it may be subject to breach of fiduciary duty claims.

However, any requirement under ERISA to advocate for or negotiate on behalf of a plan is incongruous with the standards under which appraisal and fairness opinion providers operate. A Duff & Phelps' fairness opinion and appraisal professional, as a member of the American Society of Appraisers, complies with the "Principles of Appraisal Practice and Code of Ethics" ("Principles"). The Principles provide the following:

- 2.2 Objective Character of the Results of an Appraisal Undertaking. The primary objective of a monetary appraisal, is determination of a numerical result, either as a range or most probable point magnitude—the dollar amount of a value, the dollar amount of an estimated cost, the dollar amount of an estimated earning power. *This numerical result is objective and unrelated to the desires, wishes, or needs of the client who engages the appraiser to perform the work.* The amount of this figure is as *independent of what someone desires it to be as a physicist's measurement of the melting point of lead or an accountant's statement of the amount of net profits of a corporation.* All the principles of appraisal ethics stem from this central fact.⁶ (emphasis added).

In other words, we are required to provide the same appraisal or fairness opinion regarding a specific asset or transaction involving an asset regardless of who hires us or which side of the transaction we represent. The Treasury Regulations⁷ also make clear the importance of appraiser independence and point to the Uniform Standards of Professional Appraisal Practice ("USPAP").⁸ USPAP also provides industry standards for conducting appraisals. USPAP ethics rules also impose specific conduct requirements on appraisal providers, including an

Salmon, 449 N.Y. 458 (N.Y. 1929) ("At the heart of the fiduciary relationship is the duty of complete and undivided loyalty to the beneficiaries of the trust. In the classic description of then-Judge Cardozo: 'Many forms of conduct permissible, in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place.'").

⁶ <http://www.appraisers.org/docs/default-source/education/the-asa-principles-of-appraisal-practice-and-code-of-ethics.pdf?sfvrsn=4>

⁷ 26 C.F.R. § 1.170A-13(c)(5)(i)(A) (A "qualified independent appraiser" is a person who, among other things: (1) is not a party to the transaction, and is not related to any party to the transaction, (2) holds him or herself out to the public as an appraiser or performs appraisals on a regular basis; and (3) is qualified to make appraisals of the type of property being valued. Further, the regulations disqualify a valuation provider if the seller had "knowledge of facts that would cause a reasonable person to expect the appraiser falsely to overstate the value" of the property.)

⁸ See Proposed Reg. 26 C.F.R. § 1.170A-17(a) (1)-(2) (proposing to codify guidance under I.R.B. 2006-46).

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impartiality requirement.⁹ Finally, our professionals are required to meet similar requirements under state law.

Similarly, the Principles prohibit Duff & Phelps from acting as an advocate on behalf of its client. Section 4.0 of the Principles states that an “appraiser’s primary obligation to his client is to reach complete, accurate, and pertinent conclusions and numerical results regardless of the client’s wishes or instructions in this regard. The relationship between client and appraiser is not one of principal and agent”¹⁰ Section 4.3 specifically states that that we may not “become an advocate” and Section 4.5 recommends that the agreement between us and the client include “a statement that [Duff & Phelps] cannot act as an advocate or negotiator.” Finally, the Principles provide the following:

7.5 Advocacy

If an appraiser, in the writing of a report or in giving an exposition of it before third parties or in giving testimony in a court action suppresses or minimizes any facts, data, or opinions which, if fully stated, might militate against the accomplishment of his client’s objective or, if he adds any irrelevant data or unwarranted favorable opinions or places an improper emphasis on any relevant facts for the purpose of aiding his client in accomplishing his objective, he is, in the opinion of the Society, an advocate. Advocacy, as here described, affects adversely the establishment and maintenance of trust and confidence in the results of professional appraisal practice and the Society declares that it is unethical and unprofessional. (Also, see Sec. 4.3).

In summary, according to the Principles, Duff & Phelps must be objective and may not advocate on behalf of its client.¹¹

Based upon the foregoing, contrary to the Department’s position in the preamble to the Proposal and the hearings, ERISA’s duty of loyalty and conflict of interest prohibited transaction provision can be interpreted to require Duff & Phelps to advocate on behalf of the plan by which we are hired, which would conflict with the requirements of the professional standards under which we operate. As a result, if the Department requires under its final regulation that a

⁹ See USPAP Ethics Rule, http://www.uspap.org/2010USPAP/USPAP/frwrdrd/uspap_toc.htm. (appraiser “must not perform with bias” and “must not advocate the cause or interest of any party or issue”).

¹⁰ <http://www.appraisers.org/docs/default-source/education/the-asa-principles-of-appraisal-practice-and-code-of-ethics.pdf?sfvrsn=4>

¹¹ In our view, a provider of an appraisal or fairness opinion is analogous to the situation in which a judge decides whether a proposed class action settlement is fair. Just as the judge may not favor any particular class member or litigant, the provider of the appraisal or fairness opinion cannot favor the interests of its client in reaching its conclusion. In this regard, the Department has found that a judge’s determination that a settlement is “fair” is different from the determination that a fiduciary to an ERISA-governed plan would make when approving a plan’s acceptance of a class action settlement. Adopted PTE 2003-39, 68 Fed. Reg. 75632, 75635 (Dec. 31, 2003).

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provider of a fairness opinion or appraisal acts as a fiduciary for purposes of ERISA, Duff & Phelps and its professionals will be put in the untenable position of complying with ERISA and failing to meet applicable professional standards and state law requirements, or meeting professional standards and state law requirements and facing lawsuits from participants and beneficiaries, as well as the Department, for failure to comply with ERISA. Additionally, if one of our professionals was found to be in violation of applicable professional conduct standards, he or she would be prohibited from providing any fiduciary opinions. Finally, if the Department does not address this advocacy issue, we fully expect it to be the subject of litigation.

Fairness Opinion and Appraisal Providers Should Not Be Required to Second-Guess their Clients' Fiduciary Decisions

If the Department makes appraisal and fairness opinion providers fiduciaries, Duff & Phelps will be put in the position of second-guessing the fiduciary decisions made by our clients. 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).

The problem is best illustrated by example. In a typical engagement to evaluate a transaction, the plan's named fiduciary, e.g., investment committee, hires a bank, trust company or investment adviser to act as an independent, discretionary fiduciary who will evaluate the terms of the proposed transaction. The independent fiduciary, in turn, hires its own legal counsel and an organization like Duff & Phelps to provide a fairness opinion or appraisal. The independent fiduciary reviews and analyzes the fairness opinion or appraisal, but that is only one of the factors the independent fiduciary may consider. For example, advice received from legal counsel will likely influence the terms of a transaction.

If the independent fiduciary and Duff & Phelps were both fiduciaries in the above example, we are concerned that these well-established relationships will be disrupted. The independent fiduciary may be in a position where it has to cede at least some of its discretionary authority, e.g., that with respect to financial analysis, to Duff & Phelps, thereby eliminating a key component of the independent fiduciary's analysis of the entire transaction. Similarly, Duff & Phelps may not be able to cede final decision-making authority to the independent fiduciary if Duff & Phelps believes the independent fiduciary is making a decision in violation of ERISA's fiduciary duty provisions. This would particularly be an issue in the case of a fairness opinion where we provide a range of values. If the independent fiduciary decides to transact at any point other than the mid-point in the range or even outside of the range, Duff & Phelps may be compelled to bring an action in court to stop the transaction. We also note that it is far from clear whether an "actual knowledge" (i.e., awareness of the breach) or "constructive knowledge" (i.e., should have known about the breach) standard applies under section 405(a)(3).

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Therefore, if we were to continue to provide valuations or fairness opinions to plan fiduciaries, Duff & Phelps 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 on the plan fiduciary's decisions and asking the plan fiduciary the basis for its decisions, possibly even before issuing our valuation or opinion. Otherwise, we would be at risk of being jointly and severally liable for how the plan fiduciary uses the fairness opinion or appraisal.

Duff & Phelps and others are not in a position to operate in this manner. As discussed above at length, our role is to provide independent financial analysis and not to be involved in the decision-making process. Additionally, adoption of a final regulation as set forth in the Proposal may create unnecessary confusion on the part of the named fiduciary. By disrupting the traditional relationships among the named fiduciary, independent fiduciary and fairness opinion or appraisal provider, the named fiduciary may fail to recognize the role and value of each party. Therefore, for example, the named fiduciary may decide it only needs to hire a fairness opinion provider, without recognizing the importance of engaging an independent fiduciary with the discretion to analyze and make a determination with regard to all pieces of a transaction. Subsequently, we believe the regulation as proposed will have a stifling effect on our clients' abilities to operate, report to investors, and complete the transactions necessary to manage and operate plans.

The Imposition of Fiduciary Status will Unnecessarily Increase Costs and Drive Providers out of the Marketplace

In our experience, firms like Duff & Phelps perform most of their appraisal and fairness opinions in connection with plan transactions involving employer securities and ESOPs. As such, transactions involving other types of securities and other property make up a relatively small portion of their businesses. Duff & Phelps believes that the inclusion of non-ESOP appraisals, fairness opinions, and other statements of value under the definition of investment advice in the Department's final regulation, but subjecting ESOP appraisals, fairness opinions, and other statements of value to a yet unknown regulation will have an unintended consequence. We believe that many providers will weigh the compliance costs, litigation risk, and insurance costs associated with fiduciary status against the revenue generated by performing non-ESOP appraisals, fairness opinions, and other statements of value. Subsequently, they will either increase the fees that they charge to provide such services or they will no longer provide such services.

We believe that this result would be unfortunate as plans at times need fairness opinion and appraisal services in connection with specific transactions involving privately held employer securities, real estate, and other assets that do not have a readily determined market value. Excluding all fairness opinions and appraisals from the final investment advice regulation and addressing the provision of those services under a single, future regulatory scheme that also

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addresses ESOP transactions will, at least temporarily, reduce the likelihood that providers will exit the marketplace.

The “Carve outs” Should Be Clarified

As discussed above, Duff & Phelps firmly believes that the definition of “investment advice” should exclude the provision of all appraisals, fairness opinions, or similar statements for the above-discussed reasons. However, to the extent the Department is unwilling to exclude them in their entirety, we believe that the Department should in the final regulation clarify the application of the “specific transaction limitation” and the regulatory reporting carve out (discussed below) so that Duff & Phelps will not inadvertently become a fiduciary due to actions taken by its clients.

The Proposal provides that “investment advice” includes “an appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property *if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan*” (emphasis added).¹² Thus, the language in the Proposal appears to limit the definition of investment advice to “specific transactions” rather than routine transactions or, possibly, incidental transactions. Further, the Proposal includes a carve out pursuant to which a person does not provide “investment advice” if “the person provides an appraisal, fairness opinion, or statement of value to . . . [a] plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner *solely for purposes of* compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation.” While the “specific transaction” limitation and reporting carve out are helpful, Duff & Phelps believes additional clarification is needed.

Importantly, Duff & Phelps will often not know all of the purposes for which its appraisal will be used. For example, a corporation will often hire us to provide an appraisal of the company’s shares so that the Board of Directors may determine whether a proposed sale of the company at a price offered by a prospective buyer is in the best interests of its shareholders. The company may have a plan that holds employer securities. However, the named fiduciary may not specifically engage Duff & Phelps to perform an appraisal on behalf of the plan. In fact, in many cases, we may not know a plan exists. Therefore, we ask that the Department clarify in the final regulation that Duff & Phelps may include a statement in its agreement with a client that Duff & Phelps does not act as a fiduciary for purposes of ERISA in respect of any plan pursuant to the engagement unless both parties specifically acknowledge in the engagement agreement that the fairness opinion or appraisal will be used in connection with a specific transaction involving an ERISA-governed plan.

¹² Proposal, 80 Fed. Reg. 21928, 21957 (Apr. 15, 2015).

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Similarly, if Duff & Phelps provides a fairness opinion or appraisal so that the plan administrator can meet its Form 5500 obligations or other reporting or disclosure obligations described in the Proposal, we have no idea whether the plan administrator, named fiduciary, or other party will use that information “solely for the purposes” of meeting its reporting obligations. Therefore, we ask that the Department clarify in the final regulation that Duff & Phelps may include language in its engagement agreement that the fairness opinion or appraisal is provided solely for the purpose of meeting reporting or disclosure obligations described under applicable law, that the information may not be used for any other purposes, and that Duff & Phelps does not act as a fiduciary in the preparation of the fairness opinion or appraisal.

Thank you for your time and attention to these very important issues. Please do not hesitate to call me at (202) 861-0166 or Lars Golumbic at (202) 861-6615 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "David C. Kaleda", with a long horizontal flourish extending to the right.

David C. Kaleda

A handwritten signature in black ink, appearing to read "Lars C. Golumbic", with a stylized, cursive script.

Lars C. Golumbic