

Ballpark Fee Overpayment Act of 2015

Before the Committee on Finance and Revenue

The Honorable Jack Evans,

Chairman

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Room 120, John A. Wilson Building



**Testimony of
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Good morning Chairman Evans, and members of the Committee on Finance and Revenue. I am Bazil Facchina, Assistant General Counsel for the Office of Tax

and Revenue. I am pleased to present testimony on Bill 21-359, the “Ballpark Fee Overpayment Act of 2015”.

In general, the Bill would establish a non-lapsing fund called the Ballpark Fee Overpayment Fund into which \$500,000 of appropriated funds would be deposited. The fund would provide District-paid refunds of the Ballpark Fee paid by entities owned directly or indirectly by Real Estate Investment Trusts (REITs) where another entity has paid the Ballpark Fee based on the same underlying property. This legislation would provide relief to REIT entities engaged in tax structuring arrangements which result in multi-layered corporate structures that create substantial tax savings but then subject more than one entity in the structure to the Ballpark Fee. If refunds of Ballpark Fees exceed the amount available in the fund, the refunds shall be ratably reduced in proportion to the amount of each entity’s overpaid fee.

First of all, the District cannot simply exempt REITs from the Ballpark Fee because such an exemption would violate the District’s covenants to the holders of those District Ballpark Revenue Bonds payable from the Ballpark Fees. Pursuant to the Ballpark Omnibus Financing and Revenue Act of 2004 (“Act”), the bond financing documents and the public offering documents, Ballpark Fees are pledged to pay the debt service on the Ballpark Revenue Bonds. Further, Section 103(e) of

the Act (D.C. Official Code §10-1601.03(e)) states that “the District will not limit or alter the revenues pledged to secure the bonds or the basis on which the revenues are collected or allocated”, and the District has covenanted to the Bondholders to comply with the provisions of the Act and the bond documents. Thus, the District has covenanted (i.e., entered into a contractual obligation) to the bondholders to comply with the provisions of the Act and the bond documents. Violation of these covenants would create a default under the Bond documents.

Thus, under the Bill as drafted, it appears that these entities would continue to be subject to the Ballpark Fee, and would pay the fee to the extent required under the law governing the fee. Under the Bill, however, refunds of the fee would be paid from appropriated money deposited in the fund. Moreover, expenditure of money deposited in the fund would be subject to the usual rules governing appropriations.

The Office of Tax and Revenue (OTR) has certain procedural concerns with the Bill as drafted. First of all, OTR currently has pending litigation related to the imposition of the Ballpark Fee on REITs and their related entities. Summary judgment motions have been filed in this case, and are currently being considered by an Administrative Law Judge in the District’s Office of Administrative Hearings. The litigation would be directly affected by the enactment of this Bill.

Additionally, as currently drafted, there are problems with the administrability of this Bill. The Bill currently includes no applicability date, and so it is not clear whether it would have retrospective application. Further, the Bill as drafted requires the Office of Tax and Revenue to prorate claims for refunds to the extent that total claims exceed the \$500,000 deposited in the fund. This requirement could extend to refunds previously paid. It might require OTR to track every refund made from the fund and attempt to recover a pro rata share of these refunds as new claims came in, which would essentially render the program inadministrable. To avoid this, the Bill should be revised to specify the time period for applying for refunds and to which the prorating requirement would be applicable. If prorating is to be done, OTR needs to be able to identify the complete set of refund claims that are to be prorated. Further clarifications are also required relating to the qualification for the refund.

Thank you, Chairman Evans, for the opportunity to comment on this Bill. I would be happy to answer any questions at this time.