



CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD

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Ownership Interests

Charter Sections: 2601(5), 2601(6), 2601(8), 2601(12), 2601(16), 2603(c)(3), 2604(a)(1)(b),
2604(b)(2), 2604(b)(3), 2604(b)(4)

Opinions Cited: 94-18, 94-25, 94-26, 2002-1

Advisory Opinion No. 2003-7

Deputy Mayor Daniel L. Doctoroff has requested an opinion from the Conflicts of Interest Board (the "Board") concerning the application of the conflicts of interest provisions of Chapter 68 of the City Charter to his outside financial interests.¹

Background

Mr. Doctoroff had a career in the financial services industry before his appointment, effective January 1, 2002, as Deputy Mayor for Economic Development and Rebuilding. As he has disclosed to the Board, and as set forth in the disclosure reports that he has filed with the

¹ Charter Section 2603(c)(3) provides that the Board's advisory opinions will be made public "with such deletions as may be necessary to prevent disclosure of the identity of any public servant." Mr. Doctoroff has, however, agreed that the Board may forego such deletions, which would otherwise have been so substantial as to deprive this opinion of virtually all instructive value.

Board pursuant to Administrative Code Section 12-110, his outside interests include, and have included, the following:

1) Doctoroff positions: Prior to joining City service, Mr. Doctoroff was a managing partner of Oak Hill Capital Management, an investment management company. He was also a vice-president of Keystone, Inc., the primary investment entity for Robert M. Bass and his immediate family. Mr. Robert Bass played an important role in the creation of, and is a significant investor in, a number of investment funds managed by Oak Hill Capital Management, and is obligated to refer certain types of investment opportunities to these "Oak Hill funds." Mr. Doctoroff was also a member of the board of directors of several for-profit firms, including Williams Scotsman Inc. and MeriStar Hotels & Resorts, and a member of the board of several not-for-profit entities, including the Abraham Joshua Heschel School, Wildcat Services Corporation, and NYC2012, Inc. Prior to joining City service, Mr. Doctoroff resigned from all outside positions, including all positions in Oak Hill, Keystone, and their affiliates; all positions on the boards of for-profit firms; and all not-for-profit board memberships.

2) Publicly traded securities: As indicated in his financial disclosure statement, Mr. Doctoroff and his wife held in brokerage accounts a portfolio of publicly traded securities. Prior to his joining City service, Mr. Doctoroff and his wife each transferred their interests in these publicly traded securities to trusts administered by Trustee A. By the terms of the trust agreements, the purpose of these trusts is to confer on Trustee A the sole responsibility to administer the trusts, and to provide for the trustee's management of the trust assets without the involvement or knowledge of any interested party, including the freedom to dispose of original trust assets and to reinvest the proceeds of their sale as

the trustee determines. The preparer of these trust instruments has provided the Board, as required by Board Rules Section 1-05 (Definition of Blind Trust), with an affidavit stating that the trust instruments conform to the requirements of that rule. More particularly, the affidavit states that the Trustee A is independent of Mr. Doctoroff, his wife, or any other interested party, and further states that the instruments provide both for the independence of Trustee A in managing the trusts assets and for the absence of any communication between Trustee A and any interested party concerning the holdings of the trusts.

- 3) **Investment partnerships:** As also indicated in his financial disclosure report, prior to joining City service Mr. Doctoroff held interests in a number of private investment partnerships, these interests acquired in connection with his associations with Oak Hill Capital Management, with Keystone, Inc., and with Robert Bass. Some of those partnership interests were held by Mr. Doctoroff directly, and some were held in trust for the benefit of his minor children. Prior to his joining City service, Mr. Doctoroff transferred the partnership interests that he held directly to a newly established trust administered by Trustee B. Trustee B was also substituted as the trustee of the trusts held for the benefit of Mr. Doctoroff's children. The terms of the new trust provided, and the terms of the trusts for the children were amended to provide, that Trustee B would have sole responsibility to administer the trusts, and would manage these trusts assets, *except as described hereinafter*, without the involvement or knowledge of any interested party, including the freedom to dispose of original trust assets and to reinvest the proceeds of their sale as the trustee determines. The preparer of this trust instrument and of these trust amendments has filed with the Board the affidavit required by Board Rules Section

1-05 (Definition of Blind Trust), stating that the agreements conform to the requirements of the rule.

The above-noted exception to the requirement that there be no communication between Trustee B and any interested party is as follows: Trustee B may disclose to Mr. Doctoroff when the trusts no longer holds an interest in those properties described as New York City Real Estate. A list of those properties is annexed to this opinion as Appendix A. Those properties are all the New York City real properties in which the investment partnerships owned by Mr. Doctoroff had, as of his transfer of those interests to the trusts managed by Trustee B, an ownership interest. The trust agreement also provides that the trustee shall attempt to dispose of any interest in (or in entities with an interest in) New York City real property, and to avoid acquiring any new interests in New York City realty. A parallel exception is provided for the list of those companies in which the investment partnerships in which Mr. Doctoroff had an interest had a controlling, or substantial, investment. A list of those companies is annexed to this opinion as Appendix B. As in the case of the New York City Real Estate, Trustee B may disclose to Mr. Doctoroff when the trust no longer holds an interest in a company on that list.

Discussion

Following Mr. Doctoroff's initial request for advice from the Board, the Board and its staff held extensive consultations with Mr. Doctoroff's representatives, and the Chapter 68 issues raised thereby were analyzed and discussed at several Board meetings (Mr. Rosenfeld not participating). In the course of the discussions between the Board and Mr. Doctoroff's

representatives, he made further representations and agreements regarding his financial interests, as reflected in the determinations of the Board set forth below, determinations that the Board has previously communicated to Mr. Doctoroff.

Relevant Charter Sections

Charter Section 2604(a)(1)(b) provides that no regular employee of the City, such as Mr. Doctoroff, shall have an interest in a firm which is engaged in business dealings with the City. Section 2601(8) defines "business dealings" to mean any transaction involving the "sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit."

As defined in Charter Section 2601(12), "interest" includes an ownership interest in a firm. Charter Section 2601(16) defines an "ownership interest" as, inter alia, "an interest in a firm held by a public servant, or the public servant's spouse, domestic partner, or unemancipated child, which exceeds five percent of the firm or an investment of [thirty-five] thousand dollars in cash or other form of commitment, whichever is less. . . .but shall not include interests held in any... blind trust which holds or acquires an ownership interest." See also Board Rules Section 1-11 regarding periodic adjustments in the dollar amount prescribed this definition.

Charter Section 2601(6) defines, in turn, "blind trust" to mean "a trust in which a public servant, or the public servant's spouse, domestic partner, or unemancipated child, has a beneficial interest, the holdings and sources of income of which the public servant, the public servant's spouse, domestic partner, and unemancipated child have no knowledge, and which meets requirements established by rules of the board, which shall include provisions regarding the independent authority and discretion of the trustee, and the trustee's confidential treatment of information regarding the holdings and sources of income of the trust." Pursuant to Charter

Section 2601(6), the Board has promulgated its Blind Trust Rule (Board Rules Section 1-05) which defines “blind trust” to mean a trust the holdings and sources of income of which the public servant and the above-listed immediate family members have no knowledge, and which has a professional, independent trustee and whose trust instrument provides that the trustee shall have the authority and discretion to manage the trust and shall not communicate in any manner with any interested party regarding the trust. Finally, the Rule provides that the preparer of the trust shall file with the Board an affidavit stating that the trustee meets the Rule’s requirements of professional independence and that the trust instrument provides for its administration in accordance with the Rule’s requirements.

Charter Section 2604(b)(2) prohibits a public servant from engaging in any private transaction, or having any private interest, which conflicts with the proper discharge of his or her official duties.

Charter Section 2604(b)(3) prohibits a public servant from using or attempting to use his or her City position for the private advantage of the public servant or of anyone associated with the public servant. The Charter defines those “associated” with a public servant to include a “spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.” See Charter Section 2601(5).

Charter Section 2604(b)(4) forbids a public servant from disclosing confidential City information or using such information for his or her private interest.

The Board's Determinations

1) Doctoroff positions:

- a. *Prior for-profit Board memberships:* Mr. Doctoroff resigned from all board memberships, including all memberships on boards of for-profit entities, before joining City service. He has proposed to recuse himself from all matters involving any of those for-profit firms for his first year in public service, that is, until December 31, 2002. The Board notes that Chapter 68 does not require a public servant's recusal from matters involving persons or firms with which he or she was *previously* associated, the Charter's definition of "associated" including firms in which the public servant has a "present or potential interest," not a prior interest. See Charter Section 2601(5). The Board nevertheless views Mr. Doctoroff's decision to impose a one-year waiting period for dealing with matters involving these prior associates as a sound one.
- b. *Oak Hill, Keystone, and Robert Bass matters:* As noted above, and will be discussed further below, while Mr. Doctoroff has resigned from his positions at Oak Hill Capital Management and Keystone, Inc., he was on entering City service an investor in investment partnerships associated with these entities and with Robert Bass. As also discussed below, while these investments have been placed in blind trust, because they are not the diverse, publicly traded securities of the type held, for example, in his brokerage account, Mr. Doctoroff can reasonably assume that he will continue to be a co-investor with Mr. Bass and with his former associates at Oak Hill and Keystone for the foreseeable future. Because

Charter Section 2604(b)(3) requires a public servant to take no action to advantage a person with whom one has a business or financial relationship, or a firm in which one has an interest, the Board determines that Chapter 68 requires that, for his tenure in City service, Mr. Doctoroff take no actions regarding, that is, recuse himself from all matters concerning, all "Oak Hill" investment funds (including but not limited to Oak Hill Capital Partners) advised by Oak Hill Capital Management or its affiliates or successors, as well as all matters concerning Keystone, Inc., Robert M. Bass, and any other investment funds or investment management companies that Mr. Doctoroff knows to be controlled by, controlling, or under common control with any of the foregoing.

- 2) **Publicly traded securities:** As noted above, prior to joining City service Mr. Doctoroff and his wife placed the holdings of their brokerage accounts, which consisted of a portfolio of publicly traded securities, into blind trust. Pursuant to Board Rules Section 1-05(c)(1), the preparer of this Trust has provided the Board with an affidavit stating that the trustee of this trust (Trustee A) is an attorney who is independent of Mr. Doctoroff, his wife, and of any other interest party, and that the trust instrument conforms to the requirements of the Rule regarding the authority and discretion of the trustee and the restrictions on communications between the trustee and any interested party. Based on this affidavit and on its own independent review of the trust instrument, the Board determines that this trust agreement satisfies Board Rules Section 1-05, and that Mr. Doctoroff's holdings in that trust therefore do not violate Chapter 68. See, similarly, Advisory Opinion Nos. 94-18, 94-25, and 94-26.
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3) Investment partnerships: As also noted above, prior to joining City service Mr. Doctoroff also placed into blind trusts his interests in a number of investment partnerships, many of these interests held by Mr. Doctoroff directly and some held in trust for the benefit of his minor children. The trustee of these “investment partnership” blind trusts is Trustee B. The preparer of these trusts has, as in the case of the brokerage account blind trust, provided the Board with the affidavit required by Board Rules Section 1-05(c)(1) attesting to the conformity of Trustee B (an attorney) and of the trust instruments with the requirements of the Blind Trust Rule. As noted above, however, the trust instrument provides for an exception to the rule against communication between the trustee and Mr. Doctoroff regarding the trusts’ holdings. More particularly, the trust instruments permit the trustee to notify Mr. Doctoroff when the trusts no longer have an interest in one of the New York City real properties listed in Appendix A hereto, or no longer have an interest in one of the firms listed in Appendix B hereto.

This requirement, one offered by Mr. Doctoroff, parallels the federal blind trust rules.² The federal rules recognize that a blind trust has at least two separate purposes, the second of which a traditional blind trust performs imperfectly: 1) by turning portfolio management over to an independent, non-communicating trustee, the public servant cannot use, and will not appear to be using, information gained from his or her public position in making decisions about the composition of that portfolio, that is, will not be trading, or appear to be trading, on insider information, and 2) by placing one’s portfolio in a blind trust, a public

² The Board has noted that its Blind Trust Rule is based on the federal rules regarding blind trusts. See Advisory Opinion No. 94-18 at page 5.

servant will not be able use, or appear to use, his or her public position for the benefit of any of those holdings, that is, will not take government actions for the benefit of his or her private holdings. As noted, however, the traditional blind trust performs this second function imperfectly, since the public servant naturally knows what interests he or she has placed into blind trust. As the federal rules observe, “[w]hen an interested party originally places an asset in a trust, that party still possesses knowledge about those assets.” See Title 5, Code of Federal Regulations (“CFR”), Section 2634.401(a)(ii). Thus, at the establishment of the blind trust, the public servant knows what assets the trust holds, and could take, or could appear to be taking, official action to benefit those assets. The federal rules provide a solution to that shortcoming, a solution on which Mr. Doctoroff has modeled the trusts holding his investment partnerships. That solution requires, first, that the public servant shall recuse himself or herself from matters involving the interests that the public servant places into the blind trust, and second, that the trustee notify the public servant when the trust no longer holds an interest in one of those original holdings. See 5 CFR Sections 2634.401(b)(2) and 2634.403(b)(6). Following such a notification, of course, the public servant need no longer recuse from matters concerning the disposed of interest.

Here, Mr. Doctoroff has placed his investment partnerships in blind trust and has disclosed, as attached hereto, the assets of those partnerships. In order that he may not use, or appear to use, his public position to benefit those assets, the Board determines that he must recuse himself from all matters involving those properties and companies listed in Appendices A and B, unless and until Trustee B informs him that the trust no longer

has an interest in that asset. With that recusal requirement³, and based on the preparer's affidavit for these "investment partnership" trusts and on its own independent review of the instruments, the Board determines that Mr. Doctoroff's holdings in these trusts do not violate Chapter 68.

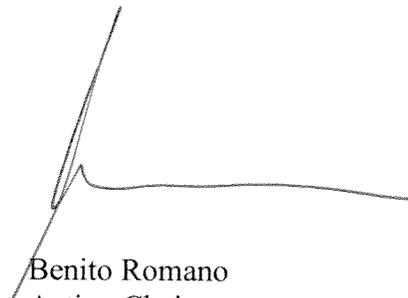
Summary

To summarize the Board's conclusions:

- 1) Mr. Doctoroff will recuse, and the Board is informed has recused, himself until December 31, 2002, from all matters involving those for-profit firms from whose board of directors he resigned upon entering City service.
- 2) For the duration of his City service, Mr. Doctoroff will recuse himself from all matters concerning all Oak Hill investment funds (including but not limited to Oak Hill Capital Partners) advised by Oak Hill Capital Management or its affiliates or successors, as well as all matters concerning Keystone, Inc., Robert M. Bass, and any other investment funds or investment management companies that Mr. Doctoroff knows to be controlled by, controlling, or under common control with any of the foregoing.
- 3) The blind trusts established by Mr. Doctoroff satisfy Board Rules Section 1-05. Mr. Doctoroff's interest in the assets held in these trusts therefore does not violate

³No such recusal is required for the assets in the trust funded by the brokerage account assets, since those assets are sufficiently diversified and marketable that, as in the case of assets held in typical mutual funds, Chapter 68 does not require recusal. See Advisory Opinion No. 2002-1, at pages 12-13, approving investments in mutual funds. The federal scheme similarly recognizes that in the case of "a widely diversified portfolio of readily marketable securities" recusal will not be required, and, accordingly, the trustee will not notify the public servant on the disposition of an asset. See 5 CFR Section 2634.404(b)(1)

Chapter 68, provided that he recuses himself from all matters involving those properties and companies listed in Appendices A and B hereto unless and until the trustee informs him that he is no longer the beneficial owner of any such interest.



Benito Romano
Acting Chair

Angela Mariana Freyre

Bruce A. Green

Jane W. Parver

Steven B. Rosenfeld did not participate in the consideration or decision of this matter.

Dated: December 18, 2003

Appendix A

New York City real estate in which, as of December 31, 2001, investment vehicles of Daniel Doctoroff had an ownership interest

350 Madison Avenue*

450 W. 33rd Street*

63 W. 38th Street*

135 W. 36th Street*

255 W. 36th Street*

248 W. 35th Street*

230 Park Avenue*

237 Park Avenue*

* Disposed of since December 31, 2001

Appendix B

Companies Owned, Controlled or Substantially
Invested in by Investment Vehicles in which
Daniel L. Doctoroff had an Investment as of 31 December 2001*

Align Technology, Inc.
American Capital Access Holdings, LLC
American Skiing Company
Bagcraft Corporation
Banner Central Finance Company
BFM Aerospace Corp.
bigchalk.com
Blackboard Inc.
Broadwing, Inc.
Busse Broadcasting Corp.
Caliber Holdings Corporation
Caribbean Restaurants Holdings, Inc.
Ceres Group, Inc.
Charter Medical Corp.
ColorTec, Inc.
Conseco, Inc.
eGain Communications Corp.
EPIX Holdings Corporation
Farley, Inc.
Financial Engines, Inc.
Gary's Group, Inc
Grove Worldwide LLC
Gryphon Foxfire Consulting, Inc.
Gryphon SpectaGuard II, Inc.
Highlands Insurance Group, Inc.
Hispanic Express, Inc
Integrated Orthopaedics, Inc
International Converter, Inc.

* The Board is advised that, since December 31, 2001, the trust no longer has an interest in an ever-increasing number of these companies. The trustee has offered to marshal for the Board a list of the trust's current beneficial holdings. Such a list will, however, be subject to change, as the trust, or the underlying partnerships, disposes of additional holdings. More significantly, the above full list discloses Mr. Doctoroff's beneficial interests at the time he entered public service and is therefore, the Board believes, the list relevant to the issues presented.

IPWireless, Inc.
IQ Commerce Corporation
IVEX Packaging Corporation
Lattice Communications, LLC
Lightening Finance Company Limited
Liquid Engines, Inc.
Longfellow I, LLC
Longfellow LTD
MeriStar Investment Partners, L.P.
MeriStar Hospitality Corp.
MeriStar Hotels & Resorts, Inc.
Metrika, Inc.
MVE Partners, LLC
Nicolaus Paper Inc.
Oreck Corporation
Pipeline Power Partners, LP
Plum Creek Timber Co. Inc
PowerBrief, Inc.
Progressive Moulded Products Limited
Provider Healthnet Services
Provincia Aseguradora de Riesgos del Trabajo S.A.
Provincia Servicios de Salud S.A.
Safety-Kleen Corp.
Scotsman Holdings, Inc.
Smith Breeden Mtg Partners, L.P.
Stage Stores, Inc.
TravelCenters of America, Inc.
US Oncology, Inc.
Washington Mutual National Bank
WideOpen West Holdings, LLC
Williams Scotsman, Inc.