

FRIENDS IN NEED:

**JOINT AND INDEPENDENT
SPENDING BY CANDIDATES**

**A REPORT BY THE NEW YORK CITY
CAMPAIGN FINANCE BOARD**

JANUARY 1997



New York City Campaign Finance Board

THE NEW YORK CITY CAMPAIGN FINANCE BOARD

The New York City Campaign Finance Board is the independent, non-partisan City agency charged with administering New York City's Campaign Finance Program, which provides matching funds to candidates who agree to contribution and expenditure limits and detailed disclosure of their campaign finances. The Board also publishes New York City's Voter Guide, which provides information about candidates, ballot proposals, and voting in municipal elections to all registered voters in New York City.

Joseph A. O'Hare, S.J.
Chairman

**Martin S. Begun, Bill Green,
James I. Lewis, Vaughn C. Williams**

Nicole A. Gordon
Executive Director

Carole Campolo
Deputy Executive Director

Laurence Laufer
General Counsel

Leo Glickman
*Chief of Candidate
Services*

Andrew Levine
*Director of Campaign
Finance Administration*

Kenneth O'Brien
*Director of System
Administration*

Carol Ozgen
*Director of Administrative
Services*

The Board would like to thank William Kastin, Staff Attorney, and Laurence Laufer, General Counsel, for their work in preparing this report.

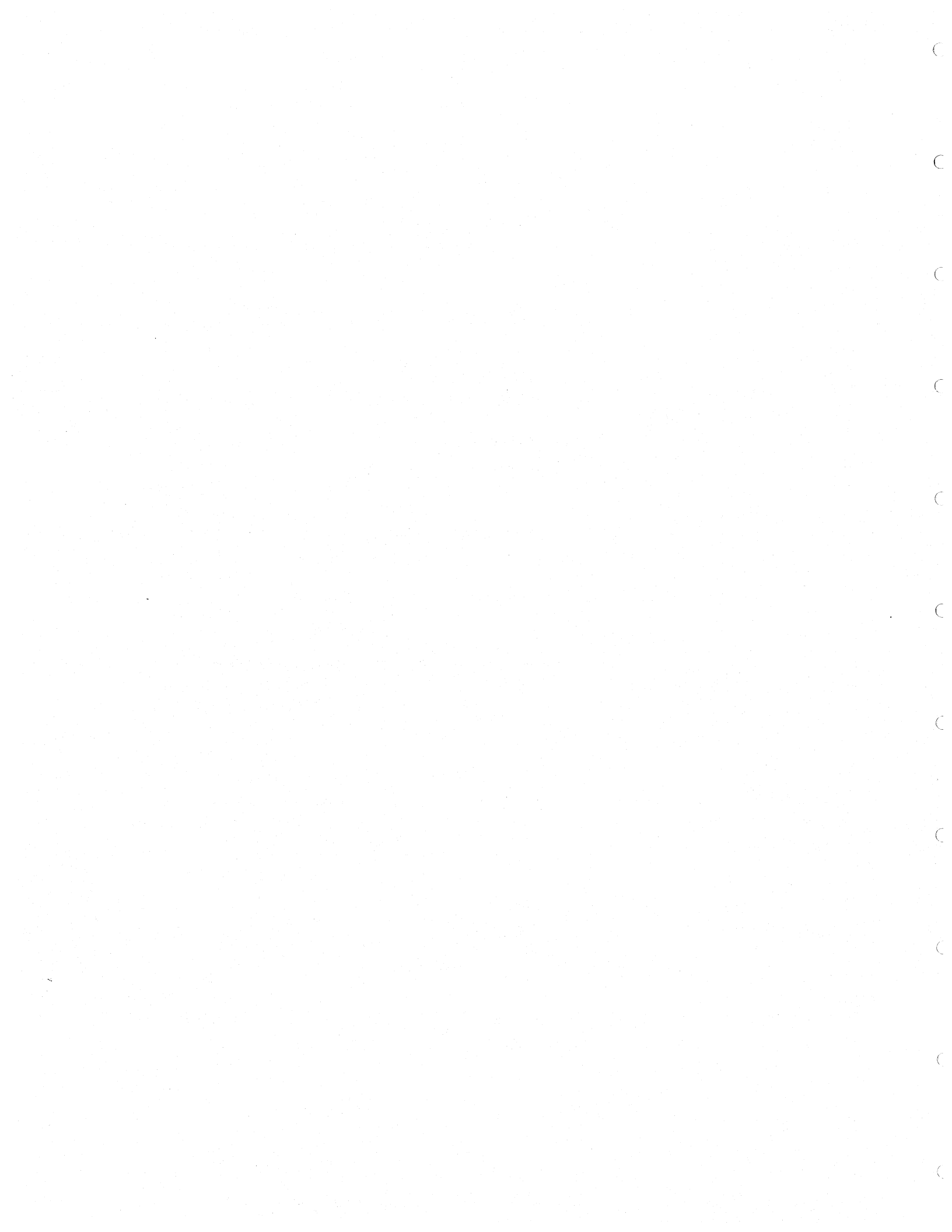


TABLE OF CONTENTS

INTRODUCTION	1
RELEVANT LAW	2
SPENDING FOR THE BENEFIT OF OTHER CANDIDATES IN THE 1993 MUNICIPAL ELECTIONS	3
THE "FUSION TICKET"	3
BADILLO AND GIULIANI	4
MESSINGER AND DINKINS	5
MESSINGER AND FRIEDLANDER	5
SPENDING FOR OTHER CANDIDATES AND CAMPAIGN FINANCE REFORM	6
GUIDELINES FOR THE FUTURE	8
"IN CONNECTION WITH" OTHER CANDIDATES	9
INDEPENDENT EXPENDITURES	9
APPORTIONMENT	10
REQUEST FOR PUBLIC COMMENT	11
ENDNOTES	12



INTRODUCTION

During the 1993 New York City election cycle, the authorized campaign committees of mayoral candidate Rudolph Giuliani and Manhattan Borough President candidate Ruth Messinger, both of whom were participating in the New York City Campaign Finance Program (the "Program"), spent campaign funds on activities that directly or indirectly benefitted other participating candidates.¹ For example, the Giuliani committee (Giuliani for New York) paid for television advertisements featuring Giuliani and his Republican/Liberal/Independence Fusion campaign running-mates, comptroller candidate Herman Badillo and public advocate candidate Susan Alter. The Messinger committee (Friends of Ruth Messinger) paid for leaflets in support of two other Democratic candidates, then-Mayor David Dinkins, who was seeking re-election, and City Council candidate Miriam Friedlander.

Opponents, including Public Advocate candidate Mark Green, Comptroller candidates Elizabeth Holtzman and Alan Hevesi, and City Councilman Antonio Pagan, charged that such spending should be considered as in-kind contributions² to the participating candidate who benefitted from the spending, and, as such, subject to the contribution and expenditure limits applicable to that candidate under the New York City Campaign Finance Act (the "Act"). In each instance, both the campaign making the expenditures and the campaign benefitting from the expenditures responded that the expenditures at issue had been made "independently" of the beneficiary's campaign, and thus should not be considered in-kind contributions.

Several people emphasized, however, that under certain circumstances, this kind of spending should be attributed to specific campaigns. As Gene Russianoff of the New York Public Interest Research Group stated, "such spending is very troubling. . . . it represents a huge potential end run around the Campaign Finance Act's spending and contribution limits, as well as its disclosure provisions."³ This viewpoint was echoed by Lawrence Mandelker, a lawyer for the Giuliani campaign, who argued that the Campaign Finance Board (the "Board") should "not permit a candidate with little or no opposition to effectively become a large donor by raising tens of thousands of dollars and then expending those funds to promote the election or defeat of other candidates."⁴

Candidates do not run for office in a vacuum. They may find that their own political goals lead them to endorse and support actively the efforts of candidates running for other offices, even to the point of running together as a "ticket." Each candidate who joins the voluntary Campaign Finance Program has separately assumed a duty to comply with the contribution and expenditure limits applicable to that candidate's individual campaign. In this report, the Board will consider the potential for abuse when one candidate's campaign chooses to spend its funds to help another participating candidate.

Among the difficult questions are:

- (1) When do the strategic and intangible benefits one candidate gains by speaking for or associating with another candidate cross the line from constitutionally

protected free speech to become an illegal financial advantage for the second candidate that undermines the Act by effectively boosting contributions or expenditures for a candidate above the applicable limits?

- (2) What kind of assistance or interaction between candidates or their surrogates constitutes the kind of cooperation that should subject one campaign's expenditure to the contribution and expenditure limits applicable to the other candidate's campaign?
- (3) What kind of an expenditure made by one candidate should be considered to have been made "in connection with" another candidate's campaign?

The Campaign Finance Act, as discussed below, does not limit the amount of independent expenditures one candidate may make on behalf of another. In applying the Act's provisions on contribution limits, the Board has developed criteria for determining whether expenditures are independent of the candidate or campaign for which the expenditures are made or chargeable to the beneficiary's contribution and spending limits under the Act.

This report examines the issue of spending by one candidate to aid another candidate. By bringing attention to and improving disclosure of this kind of spending, the Board hopes to forestall the potential for its misuse as a channel for evading the limits applicable to participants.

RELEVANT LAW

The Campaign Finance Program is voluntary. Candidates who choose to join agree to abide by contribution and expenditure limits.⁵ These limits apply to each candidate separately; there are no additional limits -- or additional disclosure requirements -- that apply to candidates running together as a "ticket." A few provisions of the Act specifically address how candidates may or may not work together. The political committee a participating candidate authorizes may not be "authorized to aid or take part in" another candidate's election.⁶ Participating candidates may not use public funds to make contributions or loans to any other candidate or political committee.⁷

In general, an expenditure made by one candidate's campaign to assist a second candidate is a contribution to the second candidate, which is subject to the contribution and expenditure limits applicable to that second candidate if he or she is participating in the Program.⁸ But there are two significant exceptions.

First, candidates may make expenditures for "joint" campaign materials and activities. As long as the benefit each candidate derives from the joint material or activity is "proportionally equivalent" to the disbursement that the candidate made, the expenditure is not considered a contribution by one candidate to the other.⁹ A candidate who pays for more than his or her proportionate share has made an in-kind contribution to the second candidate.

The second exception applies to expenditures made by a candidate (or any other person) that the second candidate or his or her agents or authorized political committees did not "authorize, request, suggest, foster or cooperate in . . ." ¹⁰ These are called "independent" expenditures and are not subject to contribution or expenditure limits. ¹¹

SPENDING FOR THE BENEFIT OF OTHER CANDIDATES IN THE 1993 MUNICIPAL ELECTIONS

During the 1993 elections, the Board received several complaints about spending by Program participants for the benefit of other participating candidates. The focus of these complaints was that the spending was not independent, either because of factual evidence of cooperation or coordination, or because of the nature of the relationship among the candidates involved.

A. The "Fusion" Ticket

During the 1993 campaign, Rudolph Giuliani, Susan Alter, and Herman Badillo ran a "Fusion" campaign whereby the candidates cross-endorsed each other, despite different party affiliations, and mounted a joint effort to press for the election of each of them to citywide office. ¹²

Green '93, the authorized committee of public advocate candidate Mark Green, filed a formal complaint against the Alter campaign. Re-Elect Liz Holtzman Comptroller, the authorized committee of comptroller candidate Elizabeth Holtzman, and Hevesi '93, the authorized committee of comptroller candidate Alan Hevesi, filed formal complaints against the Badillo campaign. The three complainants alleged that expenditures for an advertisement produced and broadcast by the Giuliani campaign were in-kind contributions to and expenditures by the Badillo and Alter campaigns. ¹³

The Giuliani, Alter, and Badillo campaigns responded that there was no cooperation among the three campaign staffs in the production or broadcast of this advertisement. The Alter campaign claimed to be unaware of the advertisement until it was broadcast. ¹⁴

The Board was faced with the question whether expenditures made for advertisements featuring more than one of the candidates in the "Fusion" campaign could be made independently. In Advisory Opinion No. 1993-10, the Board noted that cross-endorsements or nomination by the same political party would not be sufficient to give rise to a presumption that the expenditure was not independent. But the Fusion ticket represented something more:

The relationship of candidates who announce they are voluntarily running together as a "ticket," for which they have chosen to join together in a broad spectrum of activities to promote each other's election . . . is different. This symbiotic relationship -- whether within or across party lines -- makes cooperation among the candidates essential for achieving their stated intent. ¹⁵

Thus, Alter and Badillo would have the burden of demonstrating that expenditures Giuliani made "in connection with" their campaigns were independent. Moreover, the burden would be a

heavy one:

In some circumstances the cooperation between candidates may be sufficiently extensive to make the presumption against independence conclusive. Any sharing of campaign staffs, consultants, offices, telephones, or making of in-kind contributions, expenditure refunds, advances, or joint expenditures between the candidates will reduce the possibility that the presumption can be overcome.¹⁶

If the expenditures were not independent, the advisory opinion stated, the question would remain whether Alter and Badillo had paid the portion proportionally equivalent to the benefit they derived from the joint expenditure.

Upon review of the material submitted by all parties, the Board determined in Administrative Determination No. 1993-6 that the Alter and Badillo campaigns had not presented adequate evidence to rebut the presumption against independence. But because the Board had not previously addressed the question of how expenditures for candidates running as a ticket must be allocated, Alter and Badillo were not required to pay their proportionate shares of this advertisement. Instead, the Giuliani, Alter, and Badillo campaigns were directed to carry out future joint activities in accordance with the standards of Advisory Opinion No. 1993-10.¹⁷

B. Badillo and Giuliani

In a second case, the principal committee of David Dinkins, Committee for David Dinkins II, filed a complaint against Giuliani regarding a television advertisement featuring Badillo.¹⁸ Dinkins maintained that Giuliani had “embarked on a campaign of using the campaigns of his running mates to evade the campaign contribution limits and spending limits” by improperly apportioning joint expenditures of its coordinated campaign with Friends of Badillo '93. The complaint alleged that because “[t]he entire advertisement is about the race for Mayor,” and Badillo “never discusses his own candidacy or that of any of his opponents,” the costs of the advertisement, except for the most nominal amount, should be allocated to the Giuliani Committee.¹⁹

In response, the Giuliani Committee contended that because the advertisement provided “roughly equal benefit” to both the Giuliani and Badillo campaigns, each campaign paid for half the expenses of the advertisement. The answer also noted the various references Badillo made to himself throughout the advertisement and claimed the advertisement was the joint effort of partners running on a “fusion” ticket.²⁰

After reviewing Advisory Opinion No. 1993-10 and Administrative Determination No. 1993-6, described above, the Board ruled that candidates have the burden of demonstrating that they have a reasonable basis for the allocation of joint expenditures. The Board concluded that because Badillo was the sole candidate who appeared in the advertisement, Badillo urged voters to elect both Badillo and Giuliani, and Badillo specifically referred to alleged attacks on both Badillo and Giuliani, the advertisement “clearly promotes Badillo's candidacy and Giuliani's.”²¹ Accordingly, the Board

concluded that the equal allocation of costs between the two campaigns was reasonable.

C. Messinger and Dinkins

Friends of Ruth Messinger, the authorized campaign committee of Manhattan Borough President Ruth Messinger, raised approximately \$770,000 and spent approximately \$840,000 during the 1993 election cycle. Messinger joined the Program but did not apply for public funds. She ran without any primary election opposition and won re-election in the general election against opponents who had modest funding.²² Messinger endorsed then-Mayor David Dinkins for re-election. The Friends of Ruth Messinger produced and distributed campaign literature advocating the re-election of David Dinkins.²³

Giuliani for New York filed a complaint against the Dinkins campaign, claiming the "Dinkins and Messinger campaigns have been making 'joint expenditures' in the form of direct mailings and leaflets that are improperly being paid for entirely by the Messinger Campaign."²⁴ Relying on the presumption adopted by the Board in Advisory Opinion No. 1993-10, that candidates voluntarily running together as a "ticket" are cooperating in any expenditure made by one candidate that benefits the other, the Giuliani campaign cited the close relationship between the two candidates and the fact that both candidates were running as nominees of the Democratic Party in support of its argument that Dinkins and Messinger were running together as a "ticket."²⁵ The Giuliani campaign claimed that the "undeniable closeness of these candidates' relationship and their similar themes are evidence enough to compel the conclusion that these promotions are 'joint expenditures,' some portion of the costs of which must be recognized as an expenditure by the Dinkins campaign."²⁶

In its answer, the Committee for David Dinkins II stated that Dinkins and Messinger "are not running together as a 'ticket' as that term is used in Campaign Finance Board Advisory Opinion No. 1993-10 or any other determination of the Campaign Finance Board, or as used in the context of political campaigns," and that the Giuliani campaign failed to meet its "burden of proof to show that such activities or expenditures are either not independent, or are in connection with a 'fusion' ticket or are joint expenditures."²⁷

After the election, the Dinkins and Giuliani campaigns formally withdrew all outstanding complaints filed against each other. The Board responded that it would not consider the issues raised as pending complaints, but reserved the right to review the matters presented and to determine whether further action was warranted, or if the issues raised should be addressed through legislative or regulatory initiatives or through the issuance of advisory opinions.²⁸

D. Messinger and Friedlander

Ruth Messinger also endorsed Miriam Friedlander, who ran for the Democratic Party nomination in the City Council's second district. Messinger's campaign committee produced literature supporting Friedlander's campaign. The Friends of Antonio Pagan, the campaign committee authorized by Friedlander's opponent, City Council Member Antonio Pagan, requested the Board to

investigate whether the campaign literature produced by the Messinger campaign was an in-kind contribution to Friedlander. The Pagan campaign claimed coordination between the Messinger and Friedlander campaigns, evidenced by the timing of mailings, the similarities in campaign literature color, format, and style, and the apparent use of Messinger campaign staff to assist the Friedlander campaign in securing volunteers.²⁹

The Messinger campaign contended that in supporting Friedlander and other candidates with similar views, it was exercising its First Amendment right of free speech. As stated by Jesse Schaffer, Messinger's 1993 campaign manager, "[i]t happens all the time. We support David Dinkins. Our resources will be going to David Dinkins. . . . When you support a candidate, you're supporting that candidate's vision of the city. Her vision of the city is best achieved if she's working with people who share that vision."³⁰

Because the Pagan campaign did not submit a formal complaint, sworn to or affirmed, in accordance with Board rules, the matter was left to be resolved in the Board's post-election audits of the Messinger and Friedlander campaigns.³¹ In its final audit report for the Friedlander campaign issued on June 27, 1994, the Board stated:

Clearly, expenditures made by the Friends of Ruth Messinger were made to promote the election of City Council candidate Miriam Friedlander and to defeat her opponent, Antonio Pagan. Specifically, various brochures were produced and distributed by the Messinger Committee urging the election of Friedlander. The Board has promulgated rules and issued Advisory Opinions on the subject of "independent spending." Under these rules, there is no presumption that expenditures by one candidate on behalf of another are not independent, and indeed the Board has no evidence before it to refute the sworn submissions of the Messinger and Friedlander campaigns, both of which had stated under oath that spending by Messinger's campaign in furtherance of Friedlander's election was independent.

The Board has interpreted the Act so as not to interfere with "independent" spending, as set forth in the Act and as required by Buckley v. Valeo, 424 U.S. 1 (1976). The Board is, however, re-examining the issue of "independent" expenditures made on behalf of participating candidates in light of the informal charges described above and may prepare recommendations for legislative and regulatory changes addressing this subject.

SPENDING FOR OTHER CANDIDATES AND CAMPAIGN FINANCE REFORM

The right of individuals, including candidates, to work together for common political objectives is certainly protected by the First Amendment. Government may not intrude upon the exercise of this fundamental political liberty, except when the regulation is narrowly tailored to serve a compelling public interest.

The potential exists for candidates participating in the Program who face tough campaigns to benefit from considerable spending by other candidates. A candidate facing little or no challenge in his or her election could choose to spend large amounts of money to aid a candidate involved in a more competitive election. This is not only unfair to a participating opponent in the more competitive election who must comply with contribution and spending limits, but runs counter to the spirit of the Campaign Finance Act.

Candidates in the Program voluntarily submit to contribution and expenditure limits in return for the opportunity to qualify for public financing and thereby lessen the risk that contributors may use their wealth to exert undue influence over candidates and elected officials. The Program, through its limits and other provisions, also promotes fair competition among opposing candidates. While candidates may choose to form tickets and pool resources for a variety of reasons, the question arises whether cooperation among candidates in raising and spending funds threatens to undermine the goals of the limits and, hence, of the Program.

The answer must be "yes" if the common effort is not in fact an effort to elect all the candidates on the ticket. In an extreme case, for example, if one candidate has a significantly greater capacity for attracting large contributions, but cannot take advantage of it because of the contribution and expenditure limits on his or her own campaign, large contributions could instead be redirected to running mates for use in a manner that primarily benefits the first candidate. Or, the dominant candidate may judge that additional expenditures are not needed for his or her own effort, and instead seek to redirect financial support toward advancing the chances of allies with fewer resources or who are in closer races.

A single contributor could have given a total of \$19,500 (\$6,500 per candidate) to three candidates in the Program running for the three citywide offices in 1993.³² If two of these three candidates face little or no opposition in an election, money contributed to these candidates could be used for expenditures that largely benefit the third candidate who faces a tougher campaign. By knowingly spending money contributed to "safe" candidates for the benefit of an allied candidate in a competitive campaign, the contribution limits which the candidates had agreed to abide by would be effectively undermined. No longer would the third candidate be receiving only \$6,500 from a single contributor. Rather, with the assistance of the two other candidates on the ticket, the third candidate could, in effect, also receive the benefit of an additional \$13,000 given by a contributor to the other two candidates on the ticket by virtue of the way in which those contributions are spent. This scenario would not only violate the spirit of the Campaign Finance Act, but would unfairly affect other candidates participating in the Program who abide by the contribution limit.

Contrary to these worst-case scenarios, an examination of disclosure statements received by the Board for the 1993 election reveals no identifiable effort by participating Citywide candidates to evade the contribution limit by soliciting contributions to more than one candidate totaling more than \$6,500. Thus, the abusive situations described above are mere hypotheticals.

When one candidate spends funds for the benefit of a running mate, abuse of the spending

limit is also possible. The combined expenditure limits for Citywide candidates in the 1993 general election were \$9,000,000 (a \$4,000,000 limit for mayor and \$2,500,000 limits for public advocate and comptroller). If a ticket of three participating candidates includes two who face little or no opposition, these two candidates could use a large portion of their spending limit, potentially millions of dollars, to benefit the third candidate's campaign, with the result that the total spending for that candidate could then exceed the limit.

One way to measure potential abuse is by examining common vendors used by candidates running on the same ticket. Disclosure statements which indicate that candidates running on a ticket incurred common expenses from common vendors at or near the same time may signify spending by one candidate on behalf of another.

A review of disclosure statements from the 1993 election indicates that Democratic candidates David Dinkins, Mark Green, and Alan Hevesi and Republican candidates Rudolph Giuliani, Susan Alter, and Herman Badillo used common vendors for various expenditures. Although this pattern was more common among the Republican candidates, possibly due to the fact that there was greater coordination over a longer period of time among the Republican candidates who had established their Fusion ticket earlier, there is no discernible evidence that spending limit abuse occurred.

GUIDELINES FOR THE FUTURE

After reviewing the experience of the 1993 elections, the Board finds that the Program could benefit from modest changes. Each candidate's campaign files separate disclosure statements, and it is not always clear to the public when candidates are pooling their resources or making expenditures that benefit another candidate. For example, in 1993, a candidate's authorized political committee was not required to disclose that an expenditure was made to promote or oppose the election of a candidate running for a different office.³³

As described below, the Board has developed standards for properly identifying the expenditures at issue and for answering the following questions:

- (1) when will one candidate's expenditure be considered to be "in connection with" another candidate's campaign, within the meaning of the Act?
- (2) when will that expenditure be considered to have been made independent of the second candidate's campaign, and thus not subject to the limits of the Act?
- (3) if the expenditure is in connection with more than one candidate, and is not independent, how will it be apportioned among the candidates?

(1) "In Connection With" Other Candidates

(Advisory Opinion No. 1989-35 and Administrative Determination No. 1993-10)

A candidate's payment for an advertisement, literature, material, campaign event, or other activity is made "in connection with" the second candidate's nomination or election if it includes:

- 1) solicitation of contributions on behalf of the second candidate or
- 2) express advocacy of the election of the second candidate or the defeat of his or her opponent.³⁴

In addition, other factors, while not conclusive, may also provide evidence that the payment was made "in connection with" the second candidate's election:

- 1) the purpose of the material or activity, including evidence that a purpose was to promote or facilitate the election of the second candidate;
- 2) the use and prominence of the second candidate or his or her name or likeness in the material or activity;
- 3) whether the material or activity includes an expression by the second candidate of his or her view on issues brought up during the election campaign;
- 4) the timing of the material or activity in relation to the election of the second candidate;
- 5) whether the distribution of the material or the activity is targeted to the second candidate's electorate; and
- 6) the amount of control the second candidate has over the material or activity.³⁵

(2) Independent Expenditures

(Rule 1-08(f)(5))

Concluding that an expenditure in connection with another candidate's campaign is not independent is not appropriate in every case. To reflect this, the Board recently codified its 1993 advisory opinion, concluding that only if candidates announce they are running together as a ticket, for which they have chosen to join together in a broad spectrum of activities to promote each other's election, will the Board presume that expenditures made by one candidate's campaign for materials or activities that clearly identify the other candidate are in-kind contributions to the second candidate. The sharing of staff, consultants, office space, or telephone lines, or the presence of other in-kind

contributions, expenditure refunds, advances, or joint expenditures made between the campaigns would increase the burden a participant would have to overcome this presumption.³⁶ When such a ticket is not announced, determinations will be made on a case-by-case basis without the aid of a presumption.

In some cases, a candidate will spend money in support of another person's candidacy, without the other candidate's knowledge or assistance. It would require extensive monitoring of contacts between political allies and their agents to determine whether an expenditure was made in cooperation with a candidate or was truly independent.

New Reporting Requirement

A change in the reporting requirements would help to prevent any abuse from occurring and would improve public disclosure regarding this issue. Specifically, in future elections, the Board will require participating candidates to identify the candidate supported or opposed by a given expenditure and to state whether the expenditure was independent. Failure to follow such a reporting procedure will cause the Board to question a later claim that the expenditure had been independent.

(3) Apportionment

(Rule 1-08(h) and Advisory Opinion No. 1993-10)

Under the current rules, joint expenditures are apportioned among the candidates benefitting from that expenditure. Each candidate must pay the portion of the cost that is proportionally equivalent to the benefit the candidate derives from the joint expenditure. For example, two candidates who receive equal benefit from a joint advertisement are each allocated fifty percent of the cost of the advertisement. To the extent a participant derives a disproportionate benefit, the participant is considered to have received a contribution and made an expenditure. Factors which influence a conclusion whether the benefit is proportionately equivalent include the focus of the material or activity and the geographic distribution or location of the material or activity.

A review of the 1993 election did not reveal an attempt by participants to evade the contribution or spending limit by spending money on behalf of other candidates. Nonetheless, this is an area the Board will closely monitor in the future to ensure that abuses do not occur. It is the hope of the Board that the opinions issued in 1993, subsequent changes in the Board's rules, and the analysis and guidelines set forth in this report will assist candidates in adhering to Program requirements regarding joint and independent campaign efforts.

REQUEST FOR PUBLIC COMMENT

The Board wishes to encourage discussion and comment about this report.

Please address comments on this Report to:

**Nicole Gordon
Executive Director
New York City Campaign Finance Board
40 Rector Street
7th Floor
New York, NY 10006**

The Board would appreciate receiving comments by March 31, 1997.

1. Candidates for mayor, public advocate, comptroller, borough president, and the City Council who join the Campaign Finance Program agree to abide by its contribution and expenditure limits, extensive public disclosure requirements, and the audit and other compliance-monitoring procedures of the Campaign Finance Board. In return, participating candidates who are on the ballot and meet certain threshold fund raising requirements may qualify for public funds that match contributions they receive from individual residents in New York City. See generally New York City Campaign Finance Act, codified at New York City Administrative Code §§3-701, et seq.

2. An in-kind contribution is a gift, subscription, loan, advance of, or payment for, any thing of value (other than money) made to or for any candidate or authorized committee without charge. See Campaign Finance Board Rule 1-02.

3. Hearings before the New York City Campaign Finance Board, December 8, 1993, p. 109 (testimony of Gene Russianoff, Senior Attorney, New York Public Interest Research Group).

4. Letter of Lawrence A. Mandelker to Nicole A. Gordon dated December 13, 1993.

5. Candidates participating in the Campaign Finance Program for the 1993 elections agreed to limit their contributions and expenditures as follows:

<u>Office</u>	<u>Total Contribution Limit</u>	<u>Per-Election Expenditure Limit</u>
Mayor	\$6,500	\$4,000,000
Public Advocate	\$6,500	\$2,500,000
Comptroller	\$6,500	\$2,500,000
Borough President	\$5,000	\$ 900,000
City Council Member	\$3,000	\$ 105,000

New York City Administrative Code §§3-703(1)(f); 3-706(1). A separate expenditure limit was applicable in calendar year 1992. See Administrative Code §3-706(2).

6. Administrative Code §3-709(9).

7. Administrative Code §3-704(2)(f). Moreover, under a rule adopted by the Board effective as of January 12, 1996, if a participating candidate makes contributions or loans to or expenditures for another candidate, the amount disbursed is presumed to consist entirely of contributions claimed to be matchable and, thus, will be deducted from the public funds otherwise payable to the candidate making the disbursement, unless the disbursement is reimbursed within 30 days. Campaign Finance Board Rule 5-01(n)(3).

8. See Administrative Code §3-702(8) (defining "contribution"); Campaign Finance Board Rule 1-02 (defining "in-kind contribution"); Rule 1-04(g)(1) (providing that an in-kind contribution to a candidate is also considered an expenditure by the candidate). See also New York Election Law §14-100(9) (defining "contribution").

9. Administrative Code §3-715. This provision was added by Local Law No. 69 of 1990, codifying Campaign Finance Board Advisory Opinion No. 1989-35 (July 19, 1989).

10. Administrative Code §3-702(8). See also Election Law §14-100(9). Campaign Finance Board Rule 1-08(f)(1) enumerates factors for determining whether an expenditure is independent. In Advisory Opinion No. 1993-10 (September 23, 1993), the Board discussed the circumstances under which one candidate is considered to have made an expenditure "in connection with" a second candidate's campaign and, if so, whether that expenditure was independent or joint. The analysis and conclusions of this opinion are discussed below.

11. In Buckley v. Valeo, 424 U.S. 1 (1976), the Court reviewed the Federal Election Campaign Act of 1971, as amended in 1974. The Court held, inter alia, that a \$1,000 yearly limitation on independent expenditures impermissibly burdened the constitutional right of free expression. Id. at 44. The Court found that laws restricting the expenditure of money for

political speech should be judged by the strict scrutiny standard. *Id.* at 16-17. Under this standard, state action may be sustained only if the government can show that the law is narrowly drawn to serve a compelling state interest. *Id.* at 25. The *Buckley* Court stated that "the governmental interest in preventing corruption is inadequate to justify . . . [the] ceiling on independent expenditures," *id.* at 45, as "[t]he absence of prearrangement and coordination of an expenditure with a candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments to the candidate." *Id.* at 47.

12. Commentators differed on the significance of the Fusion ticket. Some concluded that it provided New York City voters with "a viable alternative to a tired, outmoded, one-party Democratic machine." Charles Millard, "About the Mayor's Race," *Newsday*, November 4, 1993 at 76. Others put forth a different analysis. See Editorial, "Rainbow's End? David Dinkins Loses Mayoral Election in New York, New York," *The Nation*, November 22, 1993 at 607 (stating Giuliani "tried to split Dinkins's multiracial constituency by convincing an old Latino politician, Herman Badillo, to run with him for comptroller on a spurious 'fusion' ticket").

13. Verified complaint of Patrick J. Burke, attorney for Green '93, filed with the Board on September 7, 1993; Verified complaint of Daniel Bright, treasurer of Hevesi '93, filed with the Board on September 8, 1993; Verified complaint of Mary Cheasty Kornman, treasurer of Re-Elect Liz Holtzman Comptroller, filed with the Board on September 9, 1993.

In the advertisement, Giuliani's voice is heard discussing candidates Badillo and Alter. He states:

New York City needs all the help it can get. It needs Democrats and Republicans working together to try to help the city. That's why what we've done is to put together a Fusion Ticket. I've asked Susan Alter, a Councilwoman who's represented Brooklyn for over 10 years to join our ticket and to come work for New York City. Susan's a Democrat. She represents a minority district, where she's been elected and re-elected. Susan's someone who knows how to bring people together and she's proven it. We've also asked Herman Badillo to run for Comptroller of New York City. Herman brings the experience of having been a CPA, a lawyer, the first Puerto Rican to hold the office of Borough President, the first to hold the office of Deputy mayor. The First Puerto Rican to ever be elected to the United States Congress. So we believe that this Fusion Ticket proves that we are going to change New York City, that we're going to govern it differently. That we're gonna throw aside politics as usual, and that we're gonna have something very different for New York City next year.

Film clips of Badillo and Alter appear in the commercial. An on screen notice superimposed over the image of Alter states: "Susan Alter, a Democrat, is running for Public Advocate on Rudy Giuliani's Fusion ticket." An on screen notice superimposed over the image of Badillo states, "Herman Badillo, a Democrat, is running for Comptroller on Rudy Giuliani's Fusion ticket."

14. Affidavit of Mark J. McCreery, comptroller for Giuliani for New York, filed with the Board on September 10, 1993; letter of Gilbert Klaperman, attorney for the Susan Alter Campaign to Pamela Bleiwas, dated September 10, 1993; Verified answer of Bruce F. Bronster, treasurer of Friends of Badillo '93, filed with the Board on September 10, 1993.

Kay Van De Linde, Vice President of the Garth Group, media consultant to the Giuliani and Badillo campaigns, filed an affidavit stating that the advertisement was "not in any way made, authorized, requested, suggested, fostered, or otherwise cooperated in by the Badillo and Alter campaigns." Ms. Van De Linde also claimed that the Alter and Badillo campaigns "knew nothing about this television ad before it actually went on the air," and that the "Garth Group made this advertisement solely and exclusively on behalf of Giuliani for New York to promote Rudy Giuliani's general election candidacy for Mayor as the man who is bringing together this 'fusion' coalition." In his affidavit, Mark McCreery also stated that the advertisement was "intended to promote 'Fusion' as a better way of governing for New York City."

15. Advisory Opinion No. 1993-10, *supra* note 10.

16. *Id.*

17. Campaign Finance Board Administrative Determination No. 1993-6, Hevesi, Holtzman, and Green v. Badillo and Alter (September 23, 1993). Advisory Opinion No. 1993-10 was recently codified by the Board. See Campaign Finance Board Rule 1-08(f)(5).

18. Badillo stated the following in the advertisement:

The Dinkins campaign is trying to make this an election about race because they want to avoid the issue of competence. One of his supporters attacked me for marrying a Jewish woman, and another stood right next to Dinkins and called Rudy Giuliani a fascist. And while people who support the Mayor are called proud, people who support Rudy and me are called racist. We don't need these anti-Semitic and racial attacks. This city needs all of us to get along. David, you know better. End this now.

"Mr. Badillo Invokes Race," *New York Times*, October 6, 1993 at B4.

19. Verified complaint of Henry T. Berger, attorney for Committee for David Dinkins II, filed with the Board on October 18, 1993.

20. Letter of Randy M. Mastro to Andrew Schwartz dated October 20, 1993.

21. Campaign Finance Board Administrative Determination No. 1993-10, Dinkins v. Giuliani (Allocation of Joint Expenditures) (October 28, 1993).

22. Ruth Messinger did not face any opposition for the Democratic or Liberal party nominations. In the general election, she faced four opponents and received 76% of the vote. Her Republican party opponent, Elaine Reiss, received 21.5 % of the vote, while her other three opponents each received less than 2% of the vote. The Reiss campaign was the only other campaign for Manhattan borough president to report having raised or spent any campaign funds. The Reiss campaign reported having raised \$17,531 and spent \$17,345 while the Messinger campaign reported having raised \$769,820 and spent \$840,380. On the Road to Reform: Campaign Finance in the 1993 New York City Elections, Volume II, Appendix C, New York City Campaign Finance Board (September 1994).

23. One piece of campaign literature, which criticized Giuliani's positions on women's rights, city services, abortion, and family violence, concluded with the message, "RUTH MESSINGER/ DAVID DINKINS THEY'VE ONLY JUST BEGUN." Another piece stated, "VOTE MESSINGER/DINKINS NOVEMBER 2." A third flier, picturing Messinger and Dinkins side-by-side, noted that "Mayor Dinkins and I are both facing Republican opponents this November," stated that Dinkins and Messinger have "worked as partners for four years," and cited 25 local politicians who "Ruth Messinger and David Dinkins are endorsed by." All three fliers stated, "Paid for by Friends of Ruth Messinger."

24. Verified affidavit of Randy M. Mastro on behalf of the Giuliani campaign dated October 22, 1993 at 5; Letter of Randy M. Mastro to Andrew Schwartz dated October 23, 1993. See also Letter of Randy M. Mastro to Andrew Schwartz dated October 29, 1993 ("It makes a mockery of the Campaign Finance Reform system to permit subordinate party candidates facing little or no opposition to act as surrogate spokespersons for the head of the ticket and to put their ample resources behind the head of the ticket in an obvious attempt to circumvent the Act's contribution and expenditure limitations."). The political committee of Elaine Reiss, Messinger's Republican opponent, filed a letter with the Campaign Finance Board alleging that because in two instances the Messinger campaign produced brochures advocating the election of Dinkins, Dinkins should be assessed a portion of the cost of the brochures. Letter of David W. Chu to Nicole A. Gordon dated October 26, 1993.

25. In his October 22, 1993 affidavit, Randy Mastro stated:

Messinger, a Democrat who succeeded Dinkins as Manhattan Borough president, is one of the Mayor's most ardent supporters. Like the Mayor, she is now seeking reelection but, by all accounts, appears to have a formidable lead. Messinger has repeatedly campaigned with the Mayor during the race. Indeed,

while on the campaign trail, she often wears a Dinkins campaign button, even if she is not with the Mayor.
... Dinkins campaign literature, marked "PAID FOR BY THE COMMITTEE FOR DAVID DINKINS," is disseminated at Ruth Messinger's campaign headquarters.

Id. at 6-7.

26. Id. at 9. By letter to Andrew Schwartz, dated October 29, 1993, Randy Mastro stated that Messinger campaign workers were continuing to distribute literature in support of the Dinkins campaign, and urged the Board to make an immediate finding of a violation and grant appropriate relief. By letter to Nicole A. Gordon, dated October 26, David W. Chu, campaign manager for Elaine Reiss, Republican candidate for Manhattan borough president, urged the Board to investigate spending by the Messinger campaign on behalf of David Dinkins "to ensure that our public officials are required to obey the rules which they themselves agreed to follow."

27. Verified answer by Harold Ickes dated October 27, 1993 at 4. Together with the answer filed by Harold Ickes, Dinkins' campaign manager William Lynch, Jr. submitted an affidavit in opposition to the Giuliani complaint, dated October 27, 1993, claiming that the activities the Giuliani campaign complained of had been conducted independently, and that Dinkins and Messinger were not running together as a "ticket" or as a "fusion" campaign. Affidavit of William Lynch, Jr. dated October 27, 1993 at 2.

Jesse Schaffer, Messinger's campaign manager, filed an affidavit dated October 27, 1993, claiming that the literature referred to in the Giuliani complaint was "developed, designed, produced and distributed by the Messinger campaign," that "there is and has been no coordination between the Messinger campaign and its staff and that of David Dinkins," and that the campaigns have not shared anything "other than a commitment to our City." Schaffer further stated that "[a]s a current and future candidate who endorsed David Dinkins for re-election, Ruth Messinger has an obligation to act on her belief by informing the public of her position and opinions and explaining them in every possible way at every available forum." Affidavit of Jesse Schaffer dated October 27, 1993 at 2, 3, 4.

28. Letter from Harold Ickes to Andrew Schwartz, dated November 9, 1993; letter from Randy M. Mastro to Andrew Schwartz, dated November 9, 1993; letters from Andrew Schwartz to Harold Ickes and Randy M. Mastro, dated December 7, 1993.

29. Letters from Pagan campaign manager and treasurer Fielding Dupuy to Joseph A. O'Hare, S.J. dated September 2, 1993 and September 9, 1993. The Pagan campaign requested, *inter alia*, that all spending and contribution limits be removed for Pagan's campaign committee for the primary election, relief which is not authorized under the Act.

Representatives of the Messinger and Friedlander campaigns appeared at the Board's September 9, 1993, meeting to respond to questions from the Board. The Messinger campaign, represented by attorney Craig Kaplan, asserted that it was making expenditures in furtherance of the election of Miriam Friedlander, but stated that these expenditures were being made independently of the Friedlander campaign. The Friedlander campaign, by its representative Dudley Gaffin, stated that it was aware of Messinger's spending, but was not involved in coordinating or assisting in the spending in any way. Both the Messinger and Friedlander campaigns supported their claims with sworn statements by campaign representatives and by the candidates themselves stating that their activities were not coordinated. Affidavits of: Ruth W. Messinger, sworn to on September 10, 1993; Jesse Schaffer, sworn to on September 8, 1993; Miriam Friedlander, sworn to on September 9, 1993; and Frieda Bradlow, sworn to on September 9, 1993.

30. "Campaign Finance Board Ends Inquiry on Council Primary," *The Villager*, October 26, 1993 at 6.

31. Letter of Andrew Schwartz to Fielding Dupuy dated September 21, 1993. Pursuant to Campaign Finance Board Rule 7-01, a written complaint must be sworn to or affirmed, and shall specify the times, places, and names of witnesses of the acts charged as violations of the Act or rules to the extent known. The Board may dismiss a complaint that does not comply with these requirements.

32. The potential for undermining the Program's contribution limits greatly increases if one or more of the candidates is not a participant in the Program. In the 1993 election, under New York State law, a single contributor could have donated approximately \$100,000 to a Citywide candidate. See Election Law § 14-114(1)(b). (The State limit has since been lowered and is now \$41,400 to a Citywide candidate.) Therefore, if one of the Citywide candidates in 1993 was not a participant, a single contributor could have given \$113,000 to the Citywide "ticket"; if two of the candidates were not participants, a single contributor could have given the ticket as much as \$150,000, which is the maximum annual aggregate contribution. Election Law §14-114(8). The Board has recommended State legislation that would subject non-participating candidates for mayor, public advocate, comptroller, borough president, and City Council to the same contribution limits applicable to participating candidates under the Act. The proposal has been introduced in the New York State Legislature by Assemblyman Eric Vitaliano and Senator Roy Goodman.

33. In Party Favors (January 1995), the Board proposed that State law be amended to require all political committees to enumerate each candidate who is supported or opposed by an itemized disbursement.

34. In Advisory Opinion No. 1989-35 (July 19, 1989), the Board concluded that manifest cooperation between two candidates in preparing, distributing, and paying for campaign literature featuring both candidates is a payment made "in connection with" the other candidate's campaign and cannot be characterized as an independent expenditure.

35. Campaign Finance Board Administrative Determination No. 1993-10, Dinkins v. Giuliani (Allocation of Joint Expenditures) (October 28, 1993).

36. Rule 1-08(f)(5).