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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-56-A
AGENDA ITEM
For meeting of Dec. 15, 2022

December 7, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Amy Rothstein *ALR*
Assistant General Counsel

Joseph Wenzinger *JPW*
Attorney

Subject: AO 2022-23 (DataVault II) - Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on December 14, 2022.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-23

2

3 Elliot S. Berke, Esq.

4 Berke Farah LLP

5 701 8th Street NW

6 Suite 620

7 Washington, DC 20001

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9 Dear Mr. Berke:

DRAFT A

10 We are responding to your advisory opinion request on behalf of DataVault Holdings,
11 Inc. (“DataVault”), concerning the application of the Federal Election Campaign Act, 52 U.S.C.
12 §§ 30101-45 (the “Act”), and Commission regulations to DataVault’s proposal to license Adio
13 Tones, a patented technology, to political committees for use in their fundraising endeavors.
14 Because DataVault proposes to license Adio Tones to political committees in the ordinary course
15 of business, at the usual and normal charge, and on the same terms and conditions as its non-
16 political clients, the Commission concludes that the proposal would not result in prohibited in-
17 kind contributions and is, therefore, permissible.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received September
20 22, 2022 (Advisory Opinion Request (“AOR”)), and supplemental material received October 31,
21 2022 (Advisory Opinion Request Supplement (“AOR Supp.”)).

22 DataVault is a for-profit corporation organized under Delaware law.¹ DataVault wholly
23 owns Adio, LLC, a New York limited liability company. Through Adio, LLC, DataVault
24 currently licenses its patented Adio Tones technology to a range of entities, including charitable
25 organizations and for-profit entities, to use in their fundraising endeavors.

¹ AOR Supp. at 3.

1 DataVault’s Adio Tones technology allows mobile phones to “hear” tones inaudible to
2 humans.² To use this technology, the user of a mobile phone must download an app —
3 Audiomobile — and authorize the app to listen for the tones. These tones can be embedded in
4 any audio broadcast or file that is delivered by television, radio, satellite, or streaming. When the
5 app “hears” a programmed tone, the phone’s internet browser sends a notification and
6 solicitation to the phone’s user.

7 DataVault proposes to license its Adio Tones technology to political committees to use in
8 their fundraising efforts.³ With this technology, a political committee could include an inaudible
9 tone in its advertisements, and any user who downloads the Audiomobile app will, upon
10 accessing any of the committee’s advertisements, receive a notification that includes a link to the
11 political committee’s website, where the user could then make a contribution.⁴

12 DataVault states that it will charge its political committee clients a “commercially
13 reasonable” licensing fee for using Adio Tones.⁵ Further, DataVault represents that it will
14 provide its services to political committees in the ordinary course of its business, at the usual and
15 normal charge, and on the same terms and conditions as it licenses its technology to its non-
16 political clients, including charitable organizations and for-profit entities.⁶ DataVault asserts that
17 it will operate as a “commercial vendor” of political committees under the Commission’s

² AOR001.

³ AOR001-2.

⁴ AOR Supp. at 3.

⁵ AOR002. Mobile phone users would not incur a charge or transaction fee to download or use the app to make contributions to political committees.

⁶ AOR Supp. at 3.

1 regulations by acting within its “usual and normal business involv[ing] the sale, rental, lease, or
2 provision of those goods or services.”⁷

3 ***Question Presented***

4 *Is DataVault’s proposal to license Adio technology to political committees engaging in*
5 *fundraising permissible under the Act and Commission regulations?*

6 ***Legal Analysis***

7 Yes, DataVault’s proposal to license Adio technology to political committees in the
8 ordinary course of its business, for the usual and normal charge, and on the same terms and
9 conditions as DataVault offers its non-political clients is permissible under the Act and
10 Commission regulations, because it would not result in DataVault’s making a prohibited
11 contribution to its political committee clients.

12 The Act and Commission regulations prohibit corporations from making contributions to
13 federal candidates and to political committees that make contributions to federal candidates.⁸ A
14 “contribution” in this context includes “any direct or indirect payment, distribution, loan,
15 advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate,
16 campaign committee, or political party organization, in connection with any [federal] election.”⁹
17 “[A]nything of value” includes in-kind contributions, such as the provision of goods and services
18 without charge or at less than the “usual and normal charge.”¹⁰ Commission regulations define

⁷ AOR002 (citing 11 C.F.R. § 116.1(c) (defining “commercial vendor”).

⁸ 52 U.S.C. §§ 30118(a), (b)(2); 11 C.F.R. § 114.2(b).

⁹ 52 U.S.C. §§ 30118(a), (b)(2); 11 C.F.R. § 110.1(g)(3); *see also* 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a).

¹⁰ *See* 11 C.F.R. § 100.52(d)(1).

1 “usual and normal charge” as the price of goods in the market from which they ordinarily would
2 have been purchased at the time of the contribution, or the commercially reasonable rate
3 prevailing at the time services were rendered.¹¹

4 Here, DataVault represents that it will license its Adio Tones technology to political
5 committees to use in their political advertisements in the ordinary course of its business, at the
6 usual and normal charge and on the same terms and conditions as DataVault offers to its non-
7 political clients, including charitable organizations and for-profit entities.¹² Based on these
8 representations, the Commission concludes that DataVault’s proposal would not result in a
9 prohibited corporate contribution to political committees and is, therefore, permissible.

10 This response constitutes an advisory opinion concerning the application of the Act and
11 Commission regulations to the specific transactions or activities set forth in DataVault’s
12 request.¹³ The Commission emphasizes that, if there is a change in any of the facts or
13 assumptions presented, and such facts or assumptions are material to a conclusion presented in
14 this advisory opinion, then the requestor may not rely on that conclusion as support for its
15 proposed transactions or activity. Any person involved in any specific transaction or activity
16 which is indistinguishable in all its material aspects from the transaction or activity with respect
17 to which this advisory opinion is rendered may rely on this advisory opinion.¹⁴ Please note that
18 the analysis or conclusions in this advisory opinion may be affected by subsequent developments

¹¹ See *id.* § 100.52(d)(2).

¹² AOR Supp. at 3.

¹³ See 52 U.S.C. § 30108.

¹⁴ See *id.* § 30108(c)(1)(B).

1 in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

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Allen J. Dickerson

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Chairman