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Washington, DC 20463

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AGENDA ITEM
For meeting of Dec. 15, 2022

December 8, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Subject: AO 2022-22 (DataVault I) - 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 2022-22

2

3 Elliot S. Berke, Esq.

4 Berke Farah LLP

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7 Washington, DC 20001

8

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 proposals to create and sell
13 nonfungible tokens (“NFTs”) to political committees for use in the committees’ fundraising
14 endeavors. Because DataVault proposes to sell the NFTs to political committees in the ordinary
15 course of business, at the usual and normal charge, and under the same terms and conditions as
16 its non-political clients, the Commission concludes that the proposals would not result in
17 prohibited in-kind contributions and are, 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”)), supplemental materials received October 31,
21 2022 (“AOR Supp. (Oct. 31, 2022)”) and November 21, 2022 (“AOR Supp. (Nov. 21, 2022)”),
22 and publicly available information.

23 DataVault is a for-profit corporation organized under Delaware law¹ whose business
24 includes creating and selling NFTs. An NFT is a digital token, typically corresponding to

¹ AOR Supp. (Oct. 31, 2022) at 1.

1 artwork, music, gaming, or digital collectibles, on a “blockchain.” A blockchain is an online
2 platform used to publicly record the authenticity and ownership of digital information.²

3 DataVault proposes to sell NFTs to political committees. DataVault represents that it
4 would do so in the ordinary course of its business and would charge political committees the
5 usual and normal charge under the same terms and conditions as its non-political clients.³ In
6 addition, DataVault states that it would provide NFTs to political committees on a nonpartisan
7 basis⁴ and “will not seek to influence, affirmatively or negatively, the nomination or election of
8 any candidate.”⁵ DataVault asserts that the political committees will give NFTs to their
9 contributors as souvenirs “in a manner akin to a campaign hat.”⁶

10 DataVault presents two proposals. Under Proposal #1, DataVault would provide political
11 committees with customized NFTs that the political committees could offer to contributors who
12 make contributions of a certain amount.⁷ The NFTs would contain artwork, campaign literature,
13 position papers, or other digital content including video, audio, and interactive social media.⁸ An
14 NFT may also provide the recipient with VIP access to certain campaign events.

15 Each political committee that transfers an NFT to a contributor would pay DataVault a
16 fee for each NFT transferred to a contributor. DataVault provides the following example:

² See Advisory Opinion 2019-08 (Omar2020) at 1-2 (describing “Ethereum” blockchain network).

³ AOR Supp. (Nov. 21, 2022) at 1; AOR Supp. (Oct. 31, 2022) at 1.

⁴ AOR Supp. (Nov. 21, 2022) at 2.

⁵ AOR001.

⁶ AOR002.

⁷ AOR001; AOR Supp. (Nov. 21, 2022) at 1.

⁸ AOR001.

1 DataVault provides NFTs to a campaign committee. The committee offers the NFTs to
2 contributors who make a \$10.00 contribution. Once the campaign committee collects a
3 contribution connected with the NFT, it transfers the NFT to the contributor, records the \$10.00
4 contribution, and pays DataVault a fee of \$3.00.⁹

5 Under Proposal #2, DataVault would provide political committees with two types of
6 NFTs. One type would be the same as in Proposal #1, for transfer by the committees to
7 contributors who make contributions. The second type of NFT could be awarded by political
8 committees to contributors who have already received the first type of NFT and have voluntarily
9 enlisted others in making contributions of a certain amount. The second type of NFT would
10 have “greater apparent significance” than the first type of NFT, but “would hold the same
11 monetary value as the first NFT.”¹⁰

12 Here, too, the political committees would pay DataVault a fee any time they transferred
13 an NFT to a contributor. DataVault provides the following example:

14 DataVault provides “bronze” NFTs to a campaign committee. The campaign committee
15 offers the “bronze” NFT to contributors who make a \$10.00 contribution. Once the committee
16 collects a contribution connected with the “bronze” NFT, it records the \$10.00 contribution and
17 pays DataVault a fee of \$3.00. The first campaign contributor voluntarily finds a second
18 campaign contributor interested in obtaining the “bronze” NFT and contributing to the campaign

⁹ AOR002. DataVault states that its “pricing is homogenous for all market sectors and value is determined by the underlying content provided within an NFT. Artwork, license rights and multimedia and any other underlying contents are priced via customary and established pricing practices that remunerates artists and pays for field of use license of the patented technology utilized and owned by Data Vault Holdings, Inc. operated and licensed by . . . DataVault, Inc. and its[] patented Information Data Exchange designed specifically for branded, data-backed NFT assets.” AOR Supp. (Oct. 31, 2022) at 1.

¹⁰ AOR003.

1 committee. The second contributor makes a \$10.00 contribution to the campaign committee.
2 The campaign committee issues a “silver” NFT to the first contributor and pays DataVault a
3 second fee of \$3.00.¹¹

4 DataVault expects that the price it will charge each political committee for transferred
5 NFTs will enable DataVault to recoup its costs of providing the NFTs to the committee and
6 make a reasonable profit.¹² Moreover, DataVault’s contract with each political committee would
7 require the political committee to pay DataVault for transferred NFTs and to return to DataVault
8 any NFTs that have not been transferred within a commercially reasonable period of time.
9 DataVault will maintain internal processes of its own, and contractually require its political
10 committee clients to maintain internal processes, to track the number and timing of NFT
11 transfers. You assert that the blockchain “provides open ledger and complete transparency” and
12 will allow DataVault to track and verify the number and timing of NFTs transferred by its
13 political committee clients.¹³

14 ***Questions Presented***

15 1. *May DataVault design and market NFTs to political committees as outlined in*
16 *Proposal #1?*

¹¹ *Id.* For purposes of this advisory opinion, the Commission accepts DataVault’s representation that it “does not intend to process contributions to its political committee clients or to receive any funds from their contributors” and “does not wish the Commission to address those issues.” AOR Supp. (Oct. 31, 2022) at 2. An earlier statement indicating otherwise appears to have been in error. *See* AOR003 (stating DataVault “would forward contributions through a segregated account to candidates and committees and employ adequate screening procedures to ensure that the service provider does not forward illegal contributions”).

¹² AOR Supp. (Nov. 21, 2022) at 2.

¹³ AOR002-3; AOR Supp. (Nov. 21, 2022) at 2.

1 2. *May DataVault design and market NFTs to political committees to incentivize*
2 *contributors as outlined in Proposal #2?*

3 ***Legal Analysis and Conclusion***

4 Yes, DataVault may design and market NFTs to political committees in the ordinary
5 course of business, at the usual and normal charge, and under the same terms and conditions as
6 its non-political clients, as outlined in Proposal #1 and Proposal #2, because doing so would not
7 result in prohibited corporate contributions.

8 The Act and Commission regulations prohibit corporations from making contributions to
9 federal candidates and to political committees that make contributions to federal candidates.¹⁴ A
10 “contribution” includes “any direct or indirect payment, distribution, loan, advance, deposit, or
11 gift of money, or any services, or anything of value . . . to any candidate, campaign committee,
12 or political party or organization, in connection with any [federal] election.”¹⁵ “[A]nything of
13 value” includes in-kind contributions, such as the provision of goods and services without charge
14 or at less than the “usual and normal charge.”¹⁶ Commission regulations define “usual and
15 normal charge” as the price of goods in the market from which they ordinarily would have been
16 purchased at the time of the contribution, or the commercially reasonable rate prevailing at the
17 time services were rendered.¹⁷

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

¹⁵ 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).

¹⁶ *See* 11 C.F.R. § 100.52(d)(1).

¹⁷ *See id.* § 100.52(d)(2).

1 DataVault proposes to create and transfer NFTs to its political committee clients before
2 receiving payment. DataVault expects, however, to recoup its costs and make a reasonable profit
3 once the political committees pay fees to DataVault for the NFTs they provide to their
4 contributors.¹⁸ DataVault's proposed provision of NFTs and fee structure is not an exclusive
5 service for its political committee clients; rather, DataVault offers the same service, for the same
6 fee and under the same terms and conditions, to its non-political clients.¹⁹

7 In addition, as DataVault does with its non-political clients, DataVault will employ
8 various safeguards to avoid providing political committees with NFTs for which it does not
9 receive reasonable compensation.²⁰ For example, DataVault's contract with each political
10 committee client will require the political committee to pay DataVault for transferred NFTs and
11 to return any NFTs that have not been transferred to a contributor within a reasonable period of
12 time. Moreover, DataVault will maintain internal processes of its own, and contractually require
13 its political committee clients to maintain internal processes, to track the number and timing of
14 NFT transfers. DataVault will also be able to track and verify the number and timing of NFT
15 transfers via changes in the blockchain.

16 The Commission concludes that DataVault's proposals to provide political committees
17 with NFTs on the same terms that it regularly offers its non-political clients would be a
18 permissible extension of credit by DataVault in the ordinary course of business. Under the Act
19 and Commission regulations, an incorporated commercial vendor may extend credit to political

¹⁸ AOR Supp. (Nov. 21, 2022) at 2.

¹⁹ *Id.*

²⁰ *Id.*

1 committees under terms substantially similar to those the vendor offers non-political debtors.²¹
2 DataVault is a “commercial vendor” because its usual and normal business involves the
3 provision of the same services that it proposes to provide to political committees.²² An
4 “extension of credit” includes “[a]ny agreement between the creditor and political committee that
5 full payment is not due until after the creditor provides goods or services to the political
6 committee.”²³

7 In Advisory Opinion 2012-17 (m-Qube), the Commission considered whether corporate
8 treasury funds advanced to political committees by m-Qube, a commercial vendor, to fulfill
9 pledges of contributions made via text message pending payment by contributors, would be
10 prohibited corporate contributions. The Commission concluded that the advanced funds would
11 not be contributions when provided in m-Qube’s ordinary course of business as a connection
12 aggregator; instead, the payments “would be a permissible extension of credit by m-Qube in the
13 ordinary course of business,” where m-Qube proposed to “extend credit to political committees
14 under terms substantially similar to those [m-Qube] offers nonpolitical debtors.”²⁴

15 In Advisory Opinion 1982-24 (Phillips for Congress Committee), the Commission
16 concluded that an in-kind contribution would not result from artists’ consignment of their

²¹ See 11 C.F.R. § 116.3(b), (c).

²² *Id.* § 116.1(c).

²³ *Id.* § 116.1(e)(1).

²⁴ Advisory Opinion 2012-17 (m-Qube) at 8; *see also* Advisory Opinion 1990-14 (AT&T) at 6 (concluding that, “[a]s long as AT&T ... provides its usual and normal services at its usual and normal charges it will not, in most circumstances, have made a prohibited corporate contribution”); Advisory Opinion 1979-36 (Fauntroy) at 2 (concluding that corporation could expend funds in providing service to political committee before receiving payment because proposal “is of a type which is normal industry practice and contains the type of credit which is extended in the ordinary course of [the corporation’s] business with terms which are substantially similar to those given to nonpolitical, as well as political, debtors of similar risk and size of obligation”).

1 artwork to a political committee for sale at the committee’s fundraiser, even though the artists
2 would not receive payment unless and until the committee sold their artwork to contributors.
3 Under the terms of their agreements with the committee, the artists would receive their usual fees
4 for any artwork sold by the committee and the return of any unsold artwork after the fundraiser.
5 Similarly, here, under both Proposals #1 and #2, DataVault would charge each political
6 committee its usual and normal fee for any NFTs transferred by the committee to a contributor
7 and require each committee to return any NFTs that the committee has not transferred within a
8 commercially reasonable period of time.

9 Accordingly, because DataVault’s transfers of NFTs will be extensions of credit
10 under 11 C.F.R. part 116 and otherwise consistent with prior Commission interpretations of
11 the Act, DataVault’s proposed transactions with political committees, when performed by
12 DataVault in the ordinary course of business, at the usual and normal charge, and under the same
13 terms and conditions as DataVault applies to its non-political clients, would not result in
14 prohibited corporate contributions.²⁵

15 This response constitutes an advisory opinion concerning the application of the Act and
16 Commission regulations to the specific transactions or activities set forth in DataVault’s
17 request.²⁶ The Commission emphasizes that, if there is a change in any of the facts or

²⁵ The AOR refers to actions that *political committees and their contributors*, as opposed to DataVault, would take to comply with the Act and Commission regulations. *See, e.g.*, AOR002 (“political committees would report the fee as a fundraising expenditure”; “owner of [an] NFT would promote the campaign strictly on a volunteer basis and without any compensation”). The AOR also argues that a political committee’s transfer of a new NFT to a contributor who solicits a contribution from another person would not constitute “compensation” under the Act and regulations. AOR004-5. Because questions “regarding the activities of third parties[] do not qualify as advisory opinion requests,” the Commission has restricted its analysis to issues pertaining to DataVault. 11 C.F.R. § 112.1(b).

²⁶ *See* 52 U.S.C. § 30108.

1 assumptions presented, and such facts or assumptions are material to a conclusion presented in
2 this advisory opinion, then the requestor may not rely on that conclusion as support for its
3 proposed transactions or activity. Any person involved in any specific transaction or activity
4 which is indistinguishable in all its material aspects from the transaction or activity with respect
5 to which this advisory opinion is rendered may rely on this advisory opinion.²⁷ Please note that
6 the analysis or conclusions in this advisory opinion may be affected by subsequent developments
7 in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 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

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²⁷ See *id.* § 30108(c)(1)(B).