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AGENDA ITEM
For meeting of November 10, 2015
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November 6, 2015

MEMORANDUM

TO: The Commission

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Subject: AO 2015-12 (Ethiq) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 5:00 pm (Eastern Time) on November 9, 2015.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-12

2

3 Nathan Lowenstein, Esq.

4 Lowenstein & Weatherwax LLP

5 1880 Century Park East, Suite 815

6 Los Angeles, CA 90067

7

8 Dear Mr. Lowenstein:

DRAFT A

9 We are responding to your advisory opinion request on behalf of Ethiq, Inc. concerning
10 the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (the “Act”),
11 and Commission regulations to Ethiq’s proposed mobile application. The Commission
12 concludes that the proposal as described in the request is permissible under the Act and
13 Commission regulations.

14 ***Background***

15 The facts presented in this advisory opinion are based on your letter, received on
16 September 14, 2015, and your email, received on September 29, 2015 (collectively, “Advisory
17 Opinion Request” or “AOR”).

18 Ethiq is a non-partisan, for-profit, news organization and media company incorporated in
19 Delaware. In order to “enable[] its users to make more educated voting and purchasing
20 decisions,” Ethiq has developed a free, downloadable mobile application (the “App”) that will
21 help users identify candidates and corporations that align with their views on a variety of
22 political, social, and economic issues. AOR at AOR001.

23 Users will create a personal profile on the App by answering a series of questions relating
24 to current events, sports, social issues, politics, and breaking news, among other topics. To
25 match users with candidates, Ethiq will compile factual information, including voting records,
26 positions and statements, and financial contribution information from reports filed with the
27 Commission. To match users with corporations, Ethiq will compile information such as

1 independent expenditure reports, contributions and expenditures made by corporations' separate
2 segregated funds, and contributions and expenditures made by corporations' "top executives."
3 On the basis of the users' answers and the information Ethiq will compile about candidates and
4 corporations, Ethiq's algorithm will assign an individualized score to corporations and
5 candidates based on their match with the user's individual values. The user will also be able to
6 view a list of reasons why a particular candidate or corporation received a low or high score.
7 Ethiq also plans to provide links to the home pages of candidates' and committees' websites.

8 Ethiq represents that its decisions about which candidates to include in the App will be
9 based on objective, business criteria. Ethiq also represents that it does not support any candidate,
10 party, organization, or cause, and will not engage in express advocacy for or against any
11 candidate, in its presentation of information on the App.

12 Ethiq plans to generate income in two ways. First, Ethiq will sell digital advertising
13 space on the App to third parties, including candidates and political committees. Advertising
14 space will be sold to all advertisers at the same rate — which will be the market rate for such
15 advertising — and purchasing advertising space will not affect a candidate's or corporation's
16 scoring on the App. Second, Ethiq will license its proprietary algorithm and dataset (as
17 described below) to companies conducting market research.

18 Ethiq will not provide its licensees or users with any contributor's individualized contact
19 information taken from records filed with the Commission. Ethiq will convey contribution data
20 about individuals only by presenting that information in the aggregate so as not to identify any
21 individual contributor. And in the App, "Ethiq [will] not display contribution data for
22 individuals at all." AOR002. All contribution information regarding "top executives" at
23 corporations will be displayed in the aggregate.

1 ***Questions Presented***

- 2 1. *May Ethiq provide factual information about candidates to its users?*
- 3 2. *May Ethiq use Commission data to match users to candidates and/or corporations that*
4 *share their individual values?*
- 5 3. *May Ethiq license its dataset, provided it does not distribute, sell, or license data*
6 *identifying contact information for individual contributors?*
- 7 4. *May Ethiq sell advertising space to committees and candidates at the “usual and normal*
8 *charge?”*
- 9 5. *Under the proposed plan, is Ethiq required to file any reports with the Commission?*

10 ***Legal Analysis***

- 11 1. *May Ethiq provide factual information about candidates to its users?*

12 Yes, Ethiq may provide factual information about candidates to its users as proposed.

13 The Act and Commission regulations prohibit corporations from making contributions to
14 candidates in connection with a federal election. *See* 52 U.S.C. § 30118(a); 11 C.F.R.

15 § 114.2(b)(1). A “contribution” includes “any direct or indirect payment, distribution, loan,
16 advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate,
17 campaign committee, or political party or organization, in connection with any [federal] election
18 . . .” 52 U.S.C. § 30118(b)(2); *see also* 52 U.S.C. § 30101(8) and 11 C.F.R. § 100.52(a).

19 “Anything of value” includes all in-kind contributions, including the provision of goods or
20 services without charge or at less than the usual and normal charge. *See* 11 C.F.R.

21 § 100.52(d)(1).

22 The Commission has recognized several situations where corporations may distribute
23 factual information about candidates to the general public without disbursements for such

1 distributions constituting contributions. For example, absent coordination with a candidate, a
2 corporation's disbursements for voter guides distributed to the general public would not
3 ordinarily be contributions. *See* 11 C.F.R. § 114.4(c)(5). And in a number of recent advisory
4 opinions, the Commission has approved the display of candidate information and contribution
5 data as part of web-based candidate-matching programs designed to help users make and process
6 contributions. *See* Advisory Opinion 2014-07 (Crowdpac) (approving algorithm that matched
7 users to like-minded candidates based on users' political views); Advisory Opinion 2012-22
8 (skimmerhat) (same); *see also* Advisory Opinion 2011-19 (GivingSphere) (approving proposal to
9 provide users with searchable database of candidates, including their positions and contributor
10 information); *cf.* Advisory Opinion 1999-25 (DNet) (concluding tax-exempt organization under
11 26 U.S.C. § 501(c)(3) could lawfully operate website that compiled and displayed information
12 about candidates' positions and statements and linked to "reports of official campaign
13 contribution data").

14 Like both traditional voter guides and the web-based proposals discussed above, Ethiq
15 will compile factual information about candidates and list their positions on the issues based on
16 their voting records and public statements. Ethiq's matching algorithm strongly resembles that
17 proposed in Crowdpac, designed to "enable[] its users to make more educated . . . decisions"
18 about which candidates and corporations to support. AOR001.

19 Ethiq proposes to limit the candidates and committees it chooses to display on its App.
20 But Ethiq will do so based only on objective business criteria, and Ethiq "does not support any
21 particular candidate, political party, organization or political cause." AOR002. The Commission
22 thus concludes that Ethiq's proposed display of information regarding candidates' voting
23 records, statements, and campaign finance information is permissible.

1 2. *May Ethiq use Commission data to match users to candidates and/or corporations that*
2 *share their individual values?*

3 Yes, Ethiq may use Commission data to match users to candidates and corporations, as
4 proposed.

5 The Act requires each political committee to report the name, mailing address,
6 occupation, and employer name of any individual who contributes more than \$200 to the
7 committee in a calendar year. *See* 52 U.S.C. §§ 30101(13)(A), 30104(b)(3)(A); *see also* 11
8 C.F.R. §§ 100.12, 104.8(a). The Act also requires the Commission make these reports available
9 for public inspection and copying. *See* 52 U.S.C. § 30111(a)(4); *see also* 52 U.S.C. § 30112
10 (requiring Commission to make all reports publicly available online). In enacting these
11 requirements, Congress was concerned about “protect[ing] the privacy of the generally very
12 public-spirited citizens who may make a contribution to a political campaign or a political
13 party.” 117 Cong. Rec. S30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).
14 Accordingly, the Act prohibits any information copied from Commission reports from being
15 “sold or used by any person for the purpose of soliciting contributions or for commercial
16 purposes, other than using the name and address of any political committee to solicit
17 contributions from such committee.” 52 U.S.C. § 30111(a)(4); *see also* 11 C.F.R. § 104.15(a).

18 Aggregated data and data that does not contain individual contributors’ contact
19 information does not implicate the privacy concerns at the heart of section 30111(a)(4). *See*
20 Advisory Opinion 2014-07 (Crowdpac); *see also* *FEC v. Political Contributions Data*, 943 F.2d
21 190, 197-98 (2d Cir. 1991) (holding that section 30111(a)(4) prohibits uses that “could infringe
22 on the contributors’ privacy interests”). Thus, the Commission has repeatedly approved the use
23 of non-individualized contribution data obtained from reports filed with the Commission, both

1 for display to users and for internal analysis, so long as the data is not used to solicit
2 contributions and cannot be so used by third parties to whom that data is provided. *See* Advisory
3 Opinion 2013-16 (PoliticalRefund.org) (approving display of aggregate number of donors
4 requesting refunds); Advisory Opinion 2014-07 (Crowdpac) (approving display of total number
5 of contributors and total amount of contributions); *see also* Advisory Opinion 2009-19 (Club for
6 Growth) (approving use of Commission data to inform contributors of their right to request
7 refund).

8 Ethiq represents that it will use Commission data to match users with candidates or
9 corporations but that in doing it so will not provide to its users the contact information of any
10 individual contributor; it will provide only aggregated data. AOR003. For the reasons explained
11 in the authorities cited above, the provision of aggregated, non-personally-identifiable data does
12 not violate the sale and use restrictions of the Act and Commission regulations.¹ Accordingly,
13 Ethiq may use data derived from reports filed with the Commission as described above.

14 3. *May Ethiq license its dataset, provided it does not distribute, sell, or license data*
15 *identifying contact information for individual contributors?*

16 Yes, Ethiq may license its dataset as described in the request. As discussed above, the
17 Act and Commission regulations are concerned with the sale and use of individual contributor
18 information for political or commercial solicitations. *See* 52 U.S.C. § 30111(a)(4); 11 C.F.R.
19 § 104.15(a); Advisory Opinion 2009-19 (Club for Growth). Sale and use of Commission data
20 that does not contain “sufficient information to generate solicitations” to individual contributors

¹ To the extent that Ethiq intends to present its users with information about contributions that a committee makes to another committee (such as from a separate segregated fund to a candidate), such information is not within the scope of the sale and use prohibition. Advisory Opinion 1989-19 (Johnson) (concluding that section 104.15(a) does not prohibit sale of Commission data showing contributions from one committee to another because such data does not include names of individual contributors).

1 is therefore permissible. Advisory Opinion 1995-09 (NewtWatch); *see also Political*
2 *Contributions Data*, 943 F.2d at 198 (finding sale of contributor lists that did not include addresses
3 or phone numbers permissible). Because the dataset that Ethiq intends to license will include only
4 aggregated contributor information (that is, it will not provide data or contact information for
5 individual contributors) that dataset cannot be used for solicitations as contemplated by section
6 104.15. Thus, the Act and Commission regulations permit Ethiq to license its dataset as
7 described.

8 4. *May Ethiq sell advertising space to Federal political committees as well as candidates at*
9 *the “usual and normal charge?”*

10 Yes, Ethiq may sell advertising space as proposed.

11 As discussed above, the Act and Commission regulations prohibit corporations from
12 making contributions to candidates, including by providing goods or services without charge or
13 at less than the usual and normal charge. *See* 52 U.S.C. § 30118(a); 11 C.F.R. § 100.52(d)(1).
14 The Commission has long recognized that advertising space provided to candidates and political
15 committees is provided at the “usual and normal charge” if the services are provided on the same
16 terms and conditions to other advertisers. Advisory Opinion 1986-22 (WREX-TV); Advisory
17 Opinion 2005-07 (Mayberry). Accordingly, the Commission has previously concluded that a
18 website operator may sell advertising space, at the usual and normal charge, to committees about
19 which that website also provides information. *See* Advisory Opinion 2011-19 (GivingSphere) at
20 10-11 (“[T]he sale of advertising space would not constitute a contribution to the political
21 committee advertisers, so long as [the website] makes advertising space available to political
22 candidates and committees on the same terms and conditions as other advertisers.”).

1 Ethiq plans to charge political committees wishing to advertise on the App the “usual and
2 normal charge” — *i.e.*, the “market rate” — that Ethiq will also charge other advertisers.

3 AOR008. Thus, the Commission concludes that the sale of advertising space as proposed would
4 not constitute a contribution to the political committee advertisers.

5 5. *Under the proposed plan, is Ethiq required to file any reports with the Federal Election
6 Commission?*

7 No, Ethiq will not be required to file any reports with the Commission as a result of the
8 activities described in the request because the request does not indicate that Ethiq will make
9 contributions or engage in any other activities that would subject it to the reporting requirements
10 of the Act or Commission regulations.

11 The Act and Commission regulations require certain persons to file reports with the
12 Commission. For example, political committees must “file reports of receipts and
13 disbursements,” *see* 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1, and persons who spend above
14 threshold amounts on independent expenditures or electioneering communications must file
15 reports with the Commission, *see* 52 U.S.C. § 30104(c), (f); 11 C.F.R. §§ 104.20, 109.10.

16 Ethiq represents that it will not engage in express advocacy, so it will not be subject to
17 the reporting requirements for persons making independent expenditures. *See* 52 U.S.C.
18 § 30101(17) (defining “independent expenditure” as a communication “expressly advocating the
19 election or defeat of a clearly identified candidate”); *see also* 11 C.F.R. § 100.16. Second, there
20 is no indication in the advisory opinion request that Ethiq will meet the definition of “political
21 committee,” and therefore it is not subject to the reporting requirements for political committees.
22 *See* 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1. Finally, the request does not indicate that Ethiq
23 will make electioneering communications under 52 U.S.C. § 30104(f)(3), or engage in any other

