



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 15, 2022

ADVISORY OPINION 2022-23

Elliot S. Berke, Esq.
Berke Farah LLP
701 8th Street NW
Suite 620
Washington, DC 20001

Dear Mr. Berke:

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

Background

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

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

DataVault’s Adio Tones technology allows mobile phones to “hear” tones inaudible to humans.² To use this technology, the user of a mobile phone must download an app —

¹ AOR Supp. at 3.

² AOR001.

Audiomobile — and authorize the app to listen for the tones. These tones can be embedded in any audio broadcast or file that is delivered by television, radio, satellite, or streaming. When the app “hears” a programmed tone, the phone’s internet browser sends a notification and solicitation to the phone’s user.

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

DataVault states that it will charge its political committee clients a “commercially reasonable” licensing fee for using Adio Tones.⁵ Further, DataVault represents that it will provide its services to political committees in the ordinary course of its business, at the usual and normal charge, and on the same terms and conditions as it licenses its technology to its non-political clients, including charitable organizations and for-profit entities.⁶ DataVault asserts that it will operate as a “commercial vendor” of political committees under the Commission’s regulations by acting within its “usual and normal business involv[ing] the sale, rental, lease, or provision of those goods or services.”⁷

Question Presented

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

Legal Analysis

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

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.

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

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

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

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

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).

¹¹ *See id.* § 100.52(d)(2).

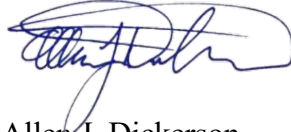
¹² AOR Supp. at 3.

¹³ *See* 52 U.S.C. § 30108.

¹⁴ *See id.* § 30108(c)(1)(B).

in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in blue ink, appearing to read "Allen J. Dickerson", with a large, sweeping flourish at the end.

Allen J. Dickerson
Chairman