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September 21, 2022

**RECEIVED**

*By Office of General Counsel at 9:52 am, Sep 22, 2022*

## BY ELECTRONIC MAIL DELIVERY

Office of General Counsel

Attn: Lisa J. Stevenson, Esq.

Acting General Counsel Federal Election Commission

1050 First Street NE

Washington, DC 20463

**RECEIVED**

*By Office of the Commission Secretary at 3:16 pm, Oct 03, 2022*

Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion from the Federal Election Commission (“Commission”) on behalf of DataVault Holdings Inc. (“DataVault”) to confirm that political committees may utilize non-fungible tokens (“NFTs”) designed and marketed by DataVault as a campaign fundraising promotion and expenditure.

## I. FACTUAL DISCUSSION

DataVault proposes to undertake the following two types of NFT fundraising using its U.S. patented technology as a business venture. Proposal #1 would involve recognition for contributions made to political committees and Proposal #2 would involve an incentive for additional campaign fundraising by contributors to political committees. DataVault’s activities to political committees will be conducted on a strictly commercial basis and DataVault will not seek to influence, affirmatively or negatively, the nomination or election of any candidate to Federal office. DataVault would provide the NFTs to political committees in the same manner and normal course of business as other non-political committee clients. DataVault would operate as a commercial vendor under 11 C.F.R. § 116.1(c), by “providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods and services.”<sup>1</sup>

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<sup>1</sup> 11 C.F.R. § 116.1(c),

### **Proposal #1**

DataVault will market NFTs to political committees as souvenirs in a manner akin to a campaign hat or souvenirs. The NFT would be offered by the political committee with a focus on high volume low dollar donors consistent with the federal contribution limits. The NFT could contain artwork, campaign literature, position papers, and other campaign approved and compliant digital content including video, audio, and interactive social media. The NFT would be commemorative and can be published to a blockchain. The NFT could provide the user with a membership # for VIP access at various levels to campaign events. There is no secondary sale of such NFTs nor smart contract associated with any political committee. DataVault would levy a usual and normal fundraising fee on the political committees as a commercial fundraising expense and the political committees would report the fee as a fundraising expenditure.

As example:

*An NFT is priced at \$10.00 and is provided by DataVault to a campaign committee. The NFT is offered by the campaign committee to contributors who make a \$10.00 contribution. Once the campaign committee collects a contribution connected with the NFT, it records the \$10.00 contribution and pays DataVault a fee of \$3.00 as a usual and normal fundraising expenditure.*

### **Proposal #2**

DataVault will market NFTs to political committees as souvenirs in a manner akin to a campaign hat or souvenirs. The NFT would be offered by the political committee with a focus on high volume low dollar donors consistent with the federal contribution limits. The NFT could contain artwork, campaign literature, position papers, and other campaign approved and compliant digital content including video, audio, and interactive social media. The NFT would be commemorative and can be published to a blockchain. The NFT could provide the user with a membership # for VIP access at various levels to campaign events. The owner of the NFT would be given the opportunity by the political committee to offer the NFT to a second contributor if the second contributor makes a contribution to the political committee. The owner of the NFT would promote the campaign strictly on a volunteer basis and without any compensation. The blockchain would provide open ledger and complete transparency and tracking and recording of

the NFT transfer and the contributions associated with it as they were made. As recognition of the first contributor's efforts, the political committee will issue a second NFT of greater apparent significance to the first contributor, but the second NFT would hold the same monetary value as the first NFT. DataVault would render all services in the ordinary course of business at the usual and normal charge or in exchange for bargained-for consideration. It 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

As example:

*An "bronze" NFT is priced at \$10.00 and is provided by DataVault to a campaign committee. The "bronze" NFT is offered by the campaign committee to contributors who make a \$10.00 contribution. Once the campaign committee collects a contribution connected with the "bronze" NFT, it records the \$10.00 contribution and pays DataVault a fee of \$3.00 as a usual and normal fundraising expenditure. The first campaign contributor voluntarily finds a second campaign contributor interested in obtaining the "bronze" NFT and contributing to the campaign committee. The second contributor makes a \$10.00 contribution to the campaign committee. The blockchain provides open ledger and complete transparency and tracks and records the "bronze" NFT transfer from the first contributor to the second contributor. The campaign committee issues a "silver" NFT to the first contributor and pays DataVault a second fee of \$3.00 as a usual and normal fundraising expenditure. DataVault would forward contributions through a segregated account to the campaign committee and employ adequate screening procedures to ensure that the service provider does not forward illegal contributions*

## **II. QUESTIONS PRESENTED**

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

### III. LEGAL ANALYSIS

President Abraham Lincoln reportedly was the first president to use buttons strategically as a campaign tool with the mass production of campaign buttons starting with William McKinley's campaign in 1896.<sup>2</sup> In essence, they represented the first campaign merchandise. The Commission has long considered situations involving business ventures by private entities involving candidate or party-related merchandise.<sup>3</sup> NFTs are a 21<sup>st</sup> century version of candidate or party-related merchandise. In Advisory Opinion 1988-17 (Election Concepts, Inc.), the Commission determined that a corporation could offer to sell products, specifically commemorative medallions (the 20<sup>th</sup> century version of an NFT) that may be useful to political organizations. The Commission further determined that the Act does not preclude such a commercial venture provided the purchase price represents the usual and normal charge.<sup>4</sup>

In Advisory Opinion 2019-08 (Omar 2020), the Commission determined that NFTs are materially indistinguishable from traditional forms of campaign souvenirs.<sup>5</sup> In that Advisory Opinion Request, the NFTs were to be used as incentives for volunteers and other supporters by a campaign committee. The Commission concluded that the provision of the NFTs to volunteers would not constitute compensation for their services. The campaign committee had represented that the NFTs had no monetary value, are not a type of cryptocurrency, and cannot be used to purchase goods or services. The only purpose of the NFTS were to provide campaign volunteers and supporters with a novel means of showing support for the campaign by being able to display unique tokens in their digital wallets earned by campaign support.

Rather than constituting a form of compensation, the Commission stated that the NFTs were analogous to more traditional types of campaign souvenirs, such as bumper stickers, yard signs or buttons. Such items are regularly distributed by campaigns to volunteers and supporters at no

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<sup>2</sup> See <https://www.americanbuttonmachines.com/blogs/american-button-machines/a-brief-history-of-political-campaign-buttons> (visited on September 13, 2022).

<sup>3</sup> Fed. Election Comm'n, Adv. Op. 1994-30 (Conservative Concepts/Pence)(Commercial sale of t-shirts advocating candidates).

<sup>4</sup> Fed. Election Comm'n, Adv. Op. 1988-17 (Election Concepts, Inc.)(Corporate sale of commemorative medallions to political committees).

<sup>5</sup> Fed. Election Comm'n, Adv. Op. 2019-08 (Omar2020) (Requestor, a congressional campaign committee, asked whether it may distribute digital blockchain tokens with no monetary value to volunteers and supporters as an incentive to engage in volunteer activities).

cost to the volunteer or supporter, and without implicating federal campaign finance law. As the Commission stated:

In fact, the distribution of such campaign souvenirs has been an essential component of American political campaigns since the earliest American elections. Campaigns rely on supporters wearing or displaying campaign insignia to promote their candidates and demonstrate the breadth of their support, while supporters display these souvenirs to express their pride in the campaign. That free campaign souvenirs can now be distributed and displayed through a digital, rather than physical, medium is immaterial for purposes of the [Federal Election Campaign] Act [“the Act”] and Commission regulations.<sup>6</sup>

Nothing in the Act or Commission regulations would limit or prohibit DataVault from marketing and distributing NFTs. As was the case in AO 2019-08 and is the case here, the Commission correctly assumes that any transaction fees incurred by a political committee for transferring the NFTs to supporters will be properly reported by the political committee as expenditures pursuant to the Act and Commission regulations.

An individual may volunteer personal services to a campaign without making a contribution as long as the individual is not compensated by anyone for the services.<sup>7</sup> Volunteer activity is not reportable.<sup>8</sup> Therefore, a political committee contributor who decides to solicit contributions for a political committee may do so – even if incentivized herein with a more significant NFT – consistent with the Act and the regulations promulgated thereunder.

The Commission has previously examined a number of business arrangements where, as here, a service provider proposed to provide contribution processing and other services to political committees.<sup>9</sup> The Commission determined that a service provider does not make a contribution to a political committee when the service provider acts as a commercial vendor by 1) rendering

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<sup>6</sup> *Id.* at 4.

<sup>7</sup> 11 CFR 100.74.

<sup>8</sup> *Id.*

<sup>9</sup> Fed. Election Comm’n, Adv. Op. 2021-10 (Retail Benefits Inc.) (Use of web-based platform to make contributions to political committees.), *citing* Advisory Opinion 2019-04 (Prytany); Advisory Opinion 2018-05 (CaringCent); Advisory Opinion 2016-08 (eBundler); Advisory Opinion 2012-09 (Points for Politics); Advisory Opinion 2010-21 (ReCellular).

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services in the ordinary course of business at the usual and normal charge or in exchange for bargained-for consideration; 2) forwarding contributions through a segregated account to candidates and committees; and 3) employing adequate screening procedures to ensure that the service provider does not forward illegal contributions.<sup>10</sup>

For these reasons, we ask the Commission to confirm that political committees may utilize non-fungible tokens (“NFTs”) designed and marketed by DataVault as a campaign fundraising incentive under both proposals articulated herein.

Very truly yours,



Elliot S. Berke

*Counsel to DataVault*

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<sup>10</sup> *Id. citing* Advisory Opinion 2019-04 (Prytany) at 5; Advisory Opinion 2018-05 (CaringCent) at 4-5; Advisory Opinion 2016-08 (eBundler) at 6-7; Advisory Opinion 2012-09 (Points for Politics) at 5-6; see also Advisory Opinion 2010-21 (ReCellular) at 5. The Commission has also concluded that such an arrangement does not result in prohibited corporate facilitation of contributions under 11 C.F.R. § 114.2(f)(1). Advisory Opinion 2007-04 (Atlatl) at 3-4.