Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

28 November 2018

SEC-OGC Opinion No.18-21
RE: Mass Media, Digital Platform

ANGELITO M. VILLANUEVA
Managing Director
FINTQnologies Corp.
6/F Launchpad
Reliance cor. Sheridan Streets
Mandaluyong City, 1550PH

Dear Mr. Villanueva,

This refers to your request for opinion on whether the Lendr online platform with a "marketplace" feature, which is operated by FINTQnologies Corp. (FINTQ), a registered software development company, is engaged in advertising and/or mass media, which are considered as nationalized activities and therefore subject to nationality restrictions provided under the Philippine Law.

In your letter dated 10 September 2018, you disclosed that FINTQ developed Lendr, a digital Platform-as-a-Service (PaaS) solution to provide an option for Bangko Sentral ng Pilipinas ("BSP") – supervised financial institutions and non-bank financial institutions ("BSFI") to outsource the performance of loan-related services electronically and interactively. Specifically, Lendr is FINTQ's loans origination and management platform which provides the following services: (a) providing information about its loan products in the Lendr marketplace; (b) accepting, processing, and approving applications for such loan products; and (c) monitoring the status of loan products availed of.

The Lendr platform is accessible via the website (www.lendr.com.ph) and through a mobile-based application and offers a "marketplace" feature. As disclosed, the "marketplace" consists of a page where the logos of BSFI partners are displayed and featured.

The Lendr platform works in three major steps:

1) Account registration,
2) Loan Selection; and
3) Loan Approval and Crediting.

As disclosed in your letter, a consumer (who desires to avail of a financial product such as a loan) must first create an account in Lendr to become a registered user (Lendr User) and member of the Lendr community and in order to access the loan products offered by BSFIs. Once an account is created, the Lendr User may now access the Lendr "marketplace" feature which consists of a page with the Lendr BSFI partner logos. To access the information about the loan from the BSFI partner and apply for said loan, a Lendr User needs to be logged-in to Lendr. No information about the loan product of the partner BSFI can be seen by the public and only Lendr Users can view said information.

The Lendr User then chooses the type of loan he needs and applies for it by inputting the necessary information in the application form as indicated and required by the Lendr BSFI partner. Lendr provides a technology service for these partner BSFI or banks under "marketplace" feature. The BSFI that the Lendr User selects for his financial needs receives the application and decides, using its own credit criteria, processes and judgment, whether to approve the loan application or not. If the loan is approved, the BSFI directly reaches out to the Lendr User for compliance with its other requirements and the release of the loan proceeds. An SMS notification from the BSFI partner will be received by the Lendr user informing him of the approval of the loan application.

After the release of the loan proceeds, both the BSFI and the Client can monitor the status of the loan using the Lendr platform. The BSFI and the Client will be able to view the outstanding balance of the loan, its payment schedule as well as other details such as the amount and date of amortization payments already made, among others.

You now seek the opinion of the Commission on whether Lendr's digital platform, which consist of a page where the BSFI partner logos are displayed and featured as well as the services it provides, are exempt from the definition and purview of advertising and/or mass media which are considered as nationalized activities and subject to nationality restrictions provided under the Philippine Law.

The 1987 Philippine Constitution imposes foreign ownership restrictions on both advertising and mass media activities. With respect to corporations, Section 11 of Article XVI imposes the following restrictions: (1) to engage in the advertising industry, at least seventy percent (70%) of the capital must be owned by Filipino citizen; and (2) in the case of mass media, it must be one hundred percent (100%) owned and managed by Filipino citizens.[1]

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[1] 1987 Philippine Constitution, Article XVI, Section 11.

In order to determine the extent of allowable foreign participation for these business activities, it is necessary to ascertain whether the corporation is an advertising agency or a mass media entity.

Article 4(b) of Republic Act No. 7394 or the Consumer Act of the Philippines (Consumer Act) defines advertising as "the business of conceptualizing, presenting or making available to the public, through any form of mass media, fact, data or information about the attributes, features, quality or availability of consumer products, services or credit."[2]

The Commission, in previous opinions, differentiated between advertising and mass media activities, to wit:

> "The function of advertising agencies is to serve as agents or counsellors of advertisers by writing, preparing, or producing the commercial messages or materials by advertisers in selling their goods and services, and by selecting and recommending the medium or media to be used as the vehicle for disseminating such messages to the public. Advertising agencies do not actually disseminate the materials they prepare as they have to utilize or avail of the facilities of mass media, i.e., newspapers, radio, television, etc., for this purpose. Advertising agencies falling within this concept are not mass media, considering that they do not operate or control any medium of communication designed to reach or influence the masses, although the activities of such agencies, by their nature, are closely related to those of mass media.
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> However, where the advertising agency actually disseminates information, or operates, controls or otherwise engages in the business of mass media, a specific example of which is an advertising firm which sells billboard space to advertisers, then such advertising agencies would fall within the purview of the constitutional limitation."[3]

From the foregoing, the main function of an advertising agency is to create and/or conceptualize the content or material to be used to promote or sell the goods. It may include selecting for or recommending to its client the avenues or channels to be used in the promotion of their goods or services. However, if the advertising agency by itself disseminates to the public the promotion or advertisements using any medium of communication, it automatically becomes a mass media entity.

Mass media, as opined by the Department of Justice,[4] refers to any medium of communication designed to reach the masses and that tends to set the standards, ideals and aims of the masses,[5] the **distinctive feature of which is the dissemination of**

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[2] The Consumer Act of the Philippines. Approved on 13 April 1992.
[3] SEC Opinion 17-07 dated 24 July 2017, addressed to Gorriceta Africa Cauton & Saavedra *citing* SEC Opinion No. 12-16 dated 13 September 2012, addressed to Puno & Puno Law Offices *citing* SEC Corporate Legal Department Opinion dated 02 September 1988.
[4] DOJ Opinion No. 40, series of 1998; cited in SEC-OGC Opinion No. 11-08 dated 03 March 2011.
[5] MOJ Opinion No. 24, s. 1986, citing MOJ Opinion No. 120, series of 1982.

information and ideas to the public, or a portion thereof.[6] The citizenship requirement is intended to prevent the use of such facility by aliens to influence public opinion to the detriment of the best interests of the nation.[7] (Emphasis and underscoring supplied).

Particularly, in the aspect of promotions and advertisements, the Consumer Act defines mass media as "any means or methods used to convey advertising messages to the public such as television, radio, magazines, cinema, billboards, posters, streamers, hand bills, leaflets, mails and the like."[8]

The Commission, in several opinions, summarized what constitutes "mass media," viz:

> "On the other hand, the term 'mass media' shall mean the gathering, **transmission of news, information, messages, signals, and forms of written oral and all visual communications and shall embrace the print medium, radio, television, film, movies, wire and radio communication services, advertising in all its phases, and their business managerial.** It embraces means of communications **which reach and influence large number of people** xxx **The term 'mass media' in the Constitution, refers to any medium of communication, a newspaper, radio, motion pictures, television, designed to reach the masses and that tends to set standards, ideals and aims of the masses."**[9] (Emphasis and underscoring supplied).

An entity, therefore, is deemed engaged in mass media if (1) it disseminates information to the general public and (2) such information are designed to affect or influence the people's way of thinking and lifestyle.

At present, mass media includes Print, Broadcast (collectively referred to as traditional media), and Electronic/Digital Media, as defined in Republic Act No. 9211 (RA 9211).[10]

In RA 9211 or the "Tobacco Regulation Act of 2003," electronic media was included in the concept of mass media, viz:

> "Mass Media – refers to any medium of communication designed to reach a mass of people. For this purposes, mass media includes print media such as, but not limited to, newspapers, magazines, and publications; broadcast media such as, but not limited to radio, television, cable television, and cinema; **electronic media such as but not limited to the internet.**"[11] (Emphasis and underscoring supplied).

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[6] *Ibid.,*

[7] *Ibid.,* citing Quisumbing-Fernando, Constitutional Law, 1984 ed., p. 345.

[8] *Id.,* at Note 1.

[9] SEC Opinion No. 27-04, dated 26 April 2004, addressed to Atty. Arnold M. Caga citing SEC Opinion dated 15 July 1991 addressed to Myrna Cruz-Feliciano.

[10] Tobacco Regulation Act of 2003. Approved on 23 June 2003.

[11] *Ibid.,* Section 4(f).

In the SEC *en Banc* decision of *In Re: Rappler, Inc., and Rappler Holdings Corporation,*[12] the Commission considers internet or online media as Mass Media pursuant to RA 9211, to wit:

> "The term 'Mass Media' was not further defined in the Constitution itself, evidently to adapt to changing times and to new technologies that may arise after 1987. Precisely to adapt to changing times, wide discretion has been given to the legislature and to administrative agencies. **Today's legislature considers internet or online media a type of Mass Media. The Commission, an administrative agency, has followed the lead of the legislature and considers internet or online media as Mass Media and subject to the Foreign Equity Restrictions of the Constitution.**
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> **What matters to the Commission in determining what is 'mass media' is the transmission of information to the masses through 'any medium of communication,' which includes technologies that were not present at the time the Constitution was drafted (e.g. Internet, Mobile Technology, and Social Media) but are nonetheless embraced by the spirit and intent of the law,** which is to prevent foreigners from wielding influence over the minds of the Filipino people." (Emphasis and underscoring supplied).

It is worth mentioning however, that the recently issued 11th Foreign Investment Negative List, noted that "internet business" is not deemed as Mass Media pursuant to DOJ Opinion No. 40 series of 1998. "Internet business" as noted, refers to **internet access providers** that merely provides internet connection and not creators of messages/information. As to the other aspects of the internet, wherein information is transmitted to and intended to influence the masses, these are still covered by the definition of mass media.[13]

These principles and points of law were applied in the following OGC Opinions. In SEC Opinion No. 12-16, the Commission posited that a corporation engaged in the operation of a voucher platform on the internet with the purpose of increasing the sales of a particular product or service is engaged in mass media.[14] This was later affirmed and expounded on by SEC Opinion 14-06, to wit:

> "With the continuing evolution and proliferation of digital communication technology, i.e. internet and mobile technology, individuals now are exposed to information that are previously restricted to a select group, making them susceptible to the influence of modern mass media techniques such as advertising and propaganda. Thus, the internet and mobile technology have become a

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[12] *SP Case No. 08-17-001,* 11 January 2018.
[13] Executive Order NO. 65, Eleventh Regular Foreign Investment Negative List. Approved on 29 October 2018.
[14] SEC Opinion No. 12-16, dated 13 September 2012, addressed to Puno & Puno Law Offices.

recognized platform for mass media. In our jurisdiction, the Tobacco Regulation Act of 2003 specifically includes the internet in the definition of 'mass media.'
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Moreover, your letter states that Komli intends to provide a digital platform to third-party websites to sell and monetize online inventory. Although Komli will not own or operate any online media outlet nor will affiliate with any internet service provider, online retailer or social networking site and will merely act as middleman by bringing together the product manufacturers and third-party websites, it will provide an online platform intended to increase the sale of a particular product. In SEC Opinion No. 12-16 this Commission opines that **if the corporation is engaged in the operation of a voucher platform on the internet with the purpose of increasing the sales of a particular product or service, it in effect disseminates information to the general public through the internet and is thus considered a mass media entity subject to the requirement of paragraph 1, Section 11, Article XVI of the 1987 Constitution and list A (1) of Executive Order No. 858."**[15] (Emphasis and underscoring supplied).

Komli was considered to be engaged in mass media as it provides a digital platform to the third-party websites to sell and monetize their online inventory which apparently is available to the public.

Although we appreciate the extensive discussion of your business model in your letter, we hesitate to issue a categorical opinion/ruling as an online platform content can be variable and mutable. It is more prudent to provide guidance instead.

In order for an online or mobile app platform operator (which renders service to third-party clients) not to be deemed as engaged in advertising activities:

1. It does not write or prepare commercial messages or materials for the products of their third-party clients to be posted in their platform or mobile app.

2. It does not select for or advise their third-party clients what medium or vehicle to use to disseminate the advertising materials and commercial messages.

Further, for an online or mobile app platform operator (which renders service to third-party clients) not to be deemed as engaging in mass media activities:

1. There is no pervasive or indiscriminate display to the general public of any promotional materials or advertisements on the products or services being offered by the third-party clients or even the platform or mobile app itself.

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[15] SEC- OGC Opinion 14-06, dated 08 May 2014, addressed to Atty. Alvin O. Geli and Atty. Regina G. Santos.

4. Only the following information may be made available in the app, website or platform:

   a. enumeration of the services offered by the platform itself;
   b. Instruction on how to use the said platform;
   c. Enumeration of third party partner, and this shall only be limited to the listing of the name or logo of the third-party client.
   d. Any other information on the platform required to be disclosed by any law or regulatory measures.

5. The disclosure of the products and services offered by its third party clients is only for the purpose of completing the transaction enabled by the app, website or platform.

Please be guided accordingly.

CAMILO S. CORREA
General Counsel