Inkshares, Inc.
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February 3, 2014

Elizabeth M. Murphy
Office of the Secretary
Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: Scope of Statutory Liabilities for Intermediaries; Release No. 33-9470

Dear Ms. Murphy,

I write you on behalf of Inkshares, Inc. Inkshares is a crowdfunded publisher. We combine a crowdfunding platform with the editorial, production, and distribution resources of a traditional publisher. In doing so, we engage readers in new and exciting ways, bring more books to market, and pay authors more. We will seek status as a portal under Title III.

This letter comments on the proposed scope of liability for portals with respect to false statements made by issuers. Section 4(a)(c) provides that an issuer will be liable if it makes a material misstatement or omission in the purchase or sale of a security. Looking to the definition of "issuer" provided in Section 4A(c)(3), which includes "any person who offers or sells the security in such offering," the Commission commented that "it appears likely that intermediaries, including funding portals, would be considered issuers for purposes of this liability provision."

On behalf of Inkshares, I respectfully submit that the Commission errs for two reasons. First, liability under Section 4(a)(c) does not properly extend to portals because portals do not "make" statements, as required under the Section.

In *Janus Capital Group v. First Derivative Traders*, the Supreme Court held that "the maker of the statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." 131 S. Ct. 2296, 2302 (2011). A funding portal does not have ultimate authority over a statement and thus cannot be "the maker of the statement." *Id.* A portal controls neither the statement's content nor whether or how it is communicated. Such control rests with the issuer and its officers, directors, and other agents. However, as defined by Title III, a funding portal only provides a platform for communication between issuers and investors. Under the facts and logic of *Janus*, Title III does not operate to grant the portal "ultimate authority" over the statement. Accordingly, even if a funding portal is an "issuer" under the Commission's interpretation, it cannot "make" the statement and thus liability cannot attach.

Second, it does not follow logically that liability attaches to the lean intermediation model on which funding portals operate. Portals provide a scalable platform that facilitates transactions between issuers and investors. Although a portal may regulate issuer behavior, such as barring the publication of statements which it knows to be misleading, or advise the issuer on the nature and structure of the offering, these responsibilities are not the essence of the funding-portal model. Even in the diligent discharge of these obligations, funding portals like Inkshares remain impartial engineers of transactions, distinct from the brokerage firms to which consonant liability might attach under Section 12(a)(2) of the Securities Act. Simply, a portal does not undertake the types of activities contemplated by Congress when it provided for such liability in the context of broker-dealers and registered transactions. Rather, portals bear more in common with the exchanges which facilitate offerings than the brokerage firms which structure and promote them.

The logical failure of the Commission's stated interpretation of Section 4(a)(c) is made more clear if we examine its prospective implementation. Under that interpretation, even where a portal takes reasonable steps to establish policies and procedures, the portal would have limited knowledge of the issuer's business and history, and therefore would be unable to detect whether the issuer is providing materially false or misleading information. It is fundamentally unclear how any funding portal could patrol every statement made on its platform. Given that, it is further unclear how the proposed due diligence defense would meaningfully operate in the context of a scalable web-based platform. Must a portal have a farrago of experts vetting the granular minutia of each proposal across varied and distinct subject matter to ensure that nothing is misleading? Section 4(a)(c) is modeled on—indeed, copied in whole cloth from—Section 12(a)(2). However sensible and meaningful such a prohibition has been in the context of brokerage firms and publicly-registered transactions, it cannot simply be recopied and enforced in an issuer-intermediary-investor paradigm that bears little resemblance to that in which it was originally developed. Because a portal is not in a position to meaningfully police these statements, the Commission's interpretation would operate to expose an innocent defendant, who cannot alter its behavior, to unfair liability. This can serve only to undermine the vision of responsible but vigorous deregulation envisioned by Congress.

Inkshares respectfully submits that a more apt regulatory paradigm would be the treatment of online service providers (OSPs) for the purposes of intellectual property infringement under the Digital Millennium Copyright Act (DMCA). OSPs are exempt from liability provided that they did not knowingly facilitate the posting of infringing material and take swift action to remove the material. The DMCA recognizes that OSPs are platforms for the transmission of information between third parties, not primary parties responsible for the generation of that information. Attaching liability for the independent actions of third parties would chill the development of these platforms and ultimately the transmission of information. Funding portals are in no way distinct—indeed, presumably all are also OSPs. They are platforms for the transmission of information, and with it securities, between third parties. Attaching liability to funding portals under Section 4(a)(c) would attract the same vexatious litigation in the antifraud context that Congress understood it necessary to avoid in the realm of intellectual property infringement when it promulgated the DMCA. The chilling effect would be even more devastating in the growth of a nascent marketplace.

The purpose of this proposal is not to dismiss or otherwise diminish the real dangers posed by false and misleading statements that Section 4(a)(c) attempts to curb. Restraining the breadth of liability under Section 4(a)(c) as contemplated in this letter will not preclude meritorious action under other statutes, by the government, or against the issuers themselves. Rather, it will curtail suit against entities whose activities should properly fall outside the purview of this Section.

On behalf of Inkshares, I thank you for your consideration of these points and look forward to further correspondence and collaboration with the Commission.

Respectfully,

/s/ Adam J. Gomolin

Adam J. Gomolin
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Inkshares, Inc.