Republic of the Philippines
Department of Finance
Securities and Exchange Commission
COMMISSION EN BANC

IN THE MATTER OF:

XIAN COIN (XNC)

-versus- SEC CDO CASE NO. *11-21-073*

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT,
Movant.
x--x

CEASE AND DESIST ORDER

This resolves the ***Motion for Issuance of a Cease and Desist Order***[1] (the "Motion") filed by the Enforcement and Investor Protection Department (EIPD), praying that an Order be issued by the Commission (a) directing XIAN COINS (XNC), its owner and founder, CHRISTIAN ALBERT SORIANO GAZA (Mr. GAZA) who is also popularly known as XIAN GAZA, the representatives, salesmen, solicitors, agents, uplines, enablers, influencers, and any and all persons claiming and acting for and in their behalf, to immediately cease and desist from further engaging in activities of selling and/or offering for sale XNC which are securities in the form of investment contracts, and cease its internet presence relating to its stated investment activities until the requisite registration statements are duly filed with and approved by the Commission and the corresponding permits to offer/sell securities are issued.

The EIPD also prayed that, unless the appropriate authority is granted by the Commission, XNC or any of its officers, representatives, salesmen, and agents be immediately prohibited from transacting any and all business involving the funds in its depository banks, and from transferring, disposing, or conveying in any other manner, any and all assets, properties, real or personal, including bank deposits, if any, of which the named persons herein may have any interest, claim or participation whatsoever, whether directly or indirectly, under their custody, to forestall grave damage and prejudice to all concerned and to ensure the preservation of the assets for the benefit of the investors.

[1] Dated on 3 November 2021.

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RELEVANT FACTS

XNC is an entity that is not registered with the Commission. It is also not registered with the Bangko Sentral ng Pilipinas as a Virtual Asset Service Provider ("VASP") under Circular No. 1108. Series of 2021 or the *Guidelines for Virtual Asset Service Providers* as of 30 September 2021. [2]

Beginning December 2020, the EIPD received numerous reports and information regarding the alleged solicitation activities of XNC which prompted the EIPD to investigate the matter for possible violations of the Securities Regulation Code ("SRC")[3], Revised Corporation Code of the Philippines (RCC) and such other rules and regulations administered and implemented by the Securities and Exchange Commission ("Commission").[4]

Based on the investigation of the EIPD, XNC is a centralized digital currency powered by the Etherium Blockchain that is exclusively traded by its coin holders. It is allegedly owned and issued by Xian Coin Crypto Bank, a virtual cryptocurrency bank which facilitates exchange of coins to Xian Coin, Colombian Peso, Mexican Peso, Brazilian Real, Peruvian Sol and Philippine Peso. The EIPD also found that the primary function of XNC, as claimed by the latter, is to create a powerful, unregulated and untraceable financial payment system that will power transactions and businesses across geographical spheres. XNC and Xian Coin Crypto Bank are entities under Philippine Pacific Holdings Co., Ltd. ("PPHC")[5] which allegedly, is a duly-registered holding company in the kingdom of Thailand with Company Registration No. 0105564059726.[6]

The EIPD investigation likewise revealed that Xian Gaza, other individuals and/or group of persons acting for and/or representing XNC are allegedly enticing the public to invest in its digital currency, claiming that the holders of XNC are guaranteed of price stability and appreciation of value due to the fact that it is taking advantage of a single, centralized supply chain. In support thereof XNC claims that it is independently controlled by the virtual crypto currency bank of Xian Gaza with a limited global supply of 75 million XNCs.

Further, the EIPD conducted an online search using Facebook and YouTube to check the veracity of the information received from the public about the business operations of XNC. Relative thereto, the EIPD found and was able to get evidence showing XNC's online presence where it is able to promote, solicit, and entice the public to invest in XIAN Coins. Screenshots of relevant online posts of XNC in social media, and its promotional videos online were submitted as attachments to support the allegations in the *Motion*.

[2] Annex A of the Motion
[3] R.A. No. 8799.
[4] *Motion* dated 3 November 2021.
[5] *Ibid.* Annex "F."
[6] *Ibid.* Annex "G-1."

As illustrated in the Roadmap posted on its website, XNC was officially established/launched on July 2020. In August 2020, it conducted its pre-ICO subscription which started at Php 40.00 for one (1) Xian Coin or XNC. During its October 2020 ICO proper, the price of XNC rose to Php 50.00/coin. The price of XNC allegedly continued to rise and reached as high as P105/coin on June 2021 from just P60.00/ coin on February 2021.[7]

For a prospective investor to purchase/invest in Xian Coins, the XNC website provides for the following steps/processes that must be complied with:

1. Download the MEW WALLET – ethereum wallet app on Google Play Store and Apple Play Store;

2. Message your FIRST NAME and HOMETOWN to NYEAM VLOGS page (www.facebook.com/NYEAMVLOGS);

3. Go to XIAN GAZA Facebook group and wait for your FIRST NAME AND HOMETOWN to be posted in the comment section of XIAN COIN CHAT AUTHENTICATOR post;

4. Once you have seen your FIRST NAME AND HOMETOWN in the comment section of the XIAN CHAT AUTHENTICATOR post, you may now ask the page admin for the GCASH ACCOUNT or BANK ACCOUNT DETAILS on where you will transfer your funds, and inform the page admin how many coins you would like to buy;

5. Once you have transferred your funds via GCASH and BANK TRANSFER you can take screenshots as proof and send to the admin page;

6. Fill out the XIAN COIN INFO SHEET to be provided by the page admin and send together with 1 valid government issued ID; and

7. Go and join the official Facebook group that will be given to you by the admin page.

[7] *Ibid.* Annex "H."

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As part of its investigation, the EIPD also secured Certifications from the Company Registration and Monitoring Department (CRMD), the Corporate Governance and Finance Department (CGFD) and the Markets and Securities Regulation Department (MSRD) of the Commission showing that XNC has not applied for a primary franchise as a corporation or partnership, has not been issued any secondary license to operate as a broker/dealer of securities, and is not a registered issuer of any securities pursuant to Sections 8 and 12 of the SRC, or of mutual funds, including exchange traded funds, membership certificates, and time shares.

On 2 June 2021, the Commission issued an Advisory informing and warning the public not to invest or stop investing in any scheme offered by XNC and/or such other entities engaged in similar activities or initial coin offerings and digital asset trading which are not registered with the Commission and the BSP, and to exercise caution in dealing with any individuals or group of persons soliciting investments for and on behalf of XNC.[8]

However, notwithstanding the foregoing, the EIPD continued to receive reports, and even a complaint, about XNC's sale, solicitation and offer of investments to the public, and found that XIAN GAZA even published online false and misleading information to the effect that the Commission has agreed to receive the amount of 10% of the total sales of XNC in exchange for not attacking his businesses.[9]

The EIPD also discovered[10] that since the issuance of the Advisory, XNC managed to create a new website in order to continue and promote its investment-taking and solicitation activities, and to provide a platform where its investors could buy and sell XIAN Coins.[11]

ISSUE

Whether the issuance of a Cease and Desist Order against XNC is warranted based on the findings and evidence presented by the EIPD.

RULING

The Commission finds merit in the *Motion* and hereby grants the same.

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[8] Annex "J"of *Motion* dated 3 November 2021.
[9] *Ibid.* Annex "K" and "L."
[10] https://xncasia.com/
[11] Paragraph 18 of *Motion* dated 3 November 2021.

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The EIPD was able to establish by substantial evidence that XNC is offering and/or selling securities to the public in the form of investment contract and digital currency denominated as XIAN Coins without the requisite license from the Commission.

XIAN Coins are securities in the form of investment contracts which XNC sells or offers to the public.

XIAN Coins are considered "virtual currency" which is defined as a digital representation of value that can be digitally traded and functions either as (1) a medium of exchange, and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status in any jurisdiction. It is not issued or guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency. Virtual currency is thus distinguished from fiat currency (a.k.a. "real currency," "real money," or "national currency"), which is the coin and paper money of a country that is designated as its legal tender, circulates, and is customarily used and accepted as a medium of exchange in the issuing country. It is distinct from e-money, which is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency. [12]

Virtual currencies, cryptocurrencies, digital coins are included in the general term "digital asset" or "digital token" which generally refers to an asset issued and/or transferred using distributed ledger or blockchain technology.[13] A blockchain or distributed ledger is a peer-to-peer database, spread across a network of computers that records all transactions in a theoretically unchangeable, digitally recorded data packages. Blockchains typically employ a consensus mechanism to validate transactions, which aims, among others, to achieve an agreement on data value on the state of ledger. They are usually traded on a digital asset trading platforms in exchange for other digital assets or fiat currency. Some digital assets are "native tokens" which means that they are represented on their own blockchain, though other digital assets may also be represented on the same blockchain.[14]

The US SEC, in its investigative report[15] on "The DAO" case, stressed that "*securities law may apply to various activities, including distributed*

[12] Financial Action Task Force (FATF) Report, Virtual Currencies, Key Definitions and Potential AML/CFT Risks, FINANCIAL ACTION TASK FORCE (June 2014), http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potentialaml-cft-risks.pdf.
[13] US SEC vs. Ripple Labs, Inc., December 22, 2020
[14] *Ibid. Ripple Labs, Inc.*
[15] July 25, 2017

ledger technology, depending on particular facts and circumstances, without regard to the form of the organization or technology used to effectuate a particular offer or sale." The US SEC further stated that "*the automation of certain functions through this technology, "smart contracts," or computer code, does not remove conduct from the purview of the U.S. federal securities laws.*[16] It then concluded that the offering of DAO tokens and the rights bestowed on the holders qualified them as securities in the form of investment contracts.

In the context of the foregoing, it becomes imperative to examine how XIAN Coins are used and/or intended to function by XNC to determine if the same can be considered securities as defined in Section 3.1 of the Securities Regulation Code (SRC), to wit:

> "*Section 3 Definition of terms.* —
>
> 3.1. **Securities are shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture** and evidenced by a certificate, contract, instrument, whether written or electronic in character. It includes:
>
> xxx
>
> (b)**Investment contracts**, certificates of interest or participation in a profit-sharing agreement, certificates of deposit for a future subscription; xxx" (Emphasis supplied)

Rule 26.3.5 of the 2015 Implementing Rules and Regulations of the SRC ("SRC IRR") defines an investment contract as follows:

> "An investment contract means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits primarily through the efforts of others. It is presumed to exist when a person seeks to use the money or property of other persons on the promise of profits.
>
> A common enterprise is deemed created when two (2) or more investors "pool" their resources, creating a common enterprise, even if the promoter receives nothing more than a broker's commission."

At the outset, the Commission notes that XNC has carried out an Initial Coin Offering (ICO) involving XIAN Coins which it claimed has

[16] 4 See SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943) ("[T]he reach of the [Securities] Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a 'security'."); see also Reves v. Ernst & Young, 494 U.S. 56, 61 (1990) ("Congress' purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called."

facilitated the continued rise in the value thereof. Considering that an ICO is a method used by entities/companies to raise funds, XIAN Coins thus represent a stake in XNC or a specific project thereof, or may have some utility in using the product or service that XNC is offering. It is in this context that the Commission classifies and holds that the ICO of XNC is an investment contract, and therefore a security, because the XIAN Coins being offered represent an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. Moreover, the Commission's finding that XIAN Coins are securities is supported by the fact that XNC, the ICO promoter, is primarily responsible for the ongoing development, operation and promotion of the coin, and has admitted that it controls the creation or issuance of the coin, or acts to limit the supply to support the price.[17]

In the case of SEC vs Howey Co., the US Supreme Court defined an investment contract as a contract or scheme for the placing of capital or laying out of money in a way intended to secure income or profit from its employment.[18] Investment contracts have been used and adopted in various situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit through the efforts of the promoter or of someone other than themselves.[19]

In 2008, the Philippine Supreme Court had the occasion to apply and discuss the *Howey Test*[20] in determining if an investment scheme, regardless of the legal terminology used, partakes of the nature of an investment contract, thus:

> *"It behooves us to trace the history of the concept of an investment contract under R.A. No. 8799. Our definition of an investment contract traces its roots from the 1946 United States (US) case of SEC v. W.J. Howey Co. In this case, the US Supreme Court was confronted with the issue of whether the Howey transaction constituted an "investment contract" under the Securities Act's definition of "security." The US Supreme Court, recognizing that the term "investment contract" was not defined by the Act or illumined by any legislative report, held that "Congress was using a term whose meaning had been crystallized" under the state's "blue sky" laws in existence prior to the adoption of the Securities Act. Thus, it ruled that the use of the catch-all term "investment contract" indicated a congressional intent to cover a wide range of investment transactions. It established a test to determine whether a transaction falls within the*

[17] See Par. 8 and Annex "E" of the Motion

[18] 328 U.S. 293 (1946)

[19] *Ibid.* Although the definition as stated in the Howey Case qualified that the earning of profit was expected to be solely through the efforts of another party, Rule 26.3 of the 2015 IRR of the SRC replaced the qualifier with *"primarily"*, acknowledging that an investment contract may still be present where the individual who placed the money exerted a small amount of effort in an attempt to earn the profits.

[20] SEC vs. Howey Co., 328 U.S. 293 (1946).

> *scope of an "investment contract." Known as the Howey Test, it requires a transaction, contract, or scheme whereby a person (1) makes an investment of money, (2) in a common enterprise, (3) with the expectation of profits, (4) to be derived solely from the efforts of others. Although the proponents must establish all four elements, the US Supreme Court stressed that the Howey Test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." Needless to state, any investment contract covered by the Howey Test must be registered under the Securities Act, regardless of whether its issuer was engaged in fraudulent practices."*[21] (Emphasis ours)

Applying the *Howey Test* to the instant case, the Commission agrees with the finding of EIPD, and holds that XNC is engaged in the sale and/or offer of securities in the form of investment contracts.

There is investment of money

First, investors part with their money when they invest in or purchase XIAN Coins. The complaint received by the EIPD shows that investors actually invested money to acquire XIAN Coins.

The money is placed in a common enterprise

Second, investors of XIAN Coins invested in a common enterprise aimed at promoting both XNC's purported trading platform and XIAN Coins to ensure that its value will continue to rise and thus attract more investors.

There is expectation of return

Third, investors of XIAN Coins expect to profit from their investment largely because Xian Gaza and/or XNC promised and assured them that its value is certain to go up. In fact, we find in the website of XNC an express representation that the value of XIAN Coins has steadily increased and has reached P105.00/unit as of June 2021 from P40.00 in August 2020.

Profits are derived primarily through the effort of others

Lastly, the expectation of profits is derived primarily from the entrepreneurial and managerial efforts of Xian Gaza, XNC, agents or representatives who, through the use of their Facebook accounts[22] and

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[21] Power Homes Unlimited Corp. v. Securities and Exchange Commission, G.R. No. 164182, February 26, 2008

[22] See Par. 4 of the Motion

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social media platforms, continue to entice the public to invest in and buy XIAN Coins and earn guaranteed returns.

XNC is offering Securities to the Public in the Philippines without license from the Commission

Section 8 of the SRC specifically proscribes the offering of securities within the Philippines without a Registration Statement duly filed with and approved by the Commission, thus:

> *"Sec. 8. Requirement of Registration of Securities. —*
> 8.1 Securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission. Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser."

Relative thereto, Rule 3.1.17 of the 2015 Implementing Rules and Regulations of the SRC defines "Public Offering" as:

> "[A]ny offering of securities to the public or to anyone, whether solicited or unsolicited.
> Any solicitation or presentation of securities for sale through any of the following modes shall be presumed to be a public offering:
> 1. Publication in any newspaper, magazine or printed reading material which is distributed within the Philippines;
> 2. Presentation in any public or commercial place;
> 3. Advertisement or announcement on radio, television, telephone, electronic communications, information communication technology or other forms of communication; or
> 4. Distribution and/or making available flyers, brochures or any offering material in a public or commercial place or to prospective purchasers through the postal system, information communication technology and other means of information distribution." (Emphasis supplied)

In the instant case, the records show that XNC is offering XIAN Coins to the public using its website and the social media, specifically the following:

(1) https://www.myetherwallet.com;
(2) Xian Gaza Facebook group or www.facebook.com/groups/carefundasia;
(3) https://www.facebook.com/NYEAMVLOGS); and
(4) https://xncasia.com.

The transcript[23] of the video of Xian Gaza posted on Facebook (which is now available in YouTube) will readily show that the offer of securities is being carried out with the promise of large return of investment. Investors are being lured to buy Xian Coins because there is a guarantee that its value is steadily rising, and may even become double or triple after a few months or years.

The foregoing constitutes public offering as defined under SRC Rule 3.1.17 and thus requires a registration statement duly approved by the Commission before the same can be lawfully undertaken. Considering that XNC has not secured a license from the Commission, its act of offering securities to the public thus constitutes a clear violation of Section 8 of the SRC.

The issuance of a CDO is warranted by the circumstances and evidence presented by the EIPD

Section 64.1 of the SRC provides that the Cease and Desist Order may be issued without necessity of a prior hearing if the act or practice will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public, thus:

> "SEC. 64. *Cease and Desist Order.* —
>
> 64.1. The Commission, after proper investigation or verification, *motu proprio*, or upon verified complaint by any aggrieved party, may issue a cease and desist order <u>without necessity of a prior hearing</u> if in its judgment the act or practice, unless restrained, will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public."

Under the afore-quoted provision, there are two (2) essential requirements that must be complied with before a cease and desist order can be validly issued: *First,* a proper investigation or verification was conducted; and *Second,* there must be a finding that the act or practice, unless restrained, will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public.[24]

After a careful review of the records of the case, the Commission

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[23] Annex M of the Motion
[24] Securities and Exchange Commission vs. Performance Foreign Exchange Corporation, G.R. No154131, July 20, 2006.

finds and so holds that the EIPD was able to fully comply with the requirements prescribed by law. The EIPD conducted an independent investigation which resulted in the gathering and submission of information and substantial evidence that supported its Motion.

Finally, the act of XNC in selling/offering XIAN Coin, an unregistered securities, operates as a fraud to the public which, if unrestrained, will likely cause grave or irreparable injury or prejudice to the investing public. The issuance of a CDO is thus in order. This finds support in *Securities and Exchange Commission vs. CJH Development Corp.*[25] where the Supreme Court categorically held that:

> "The law is clear on the point that a cease and desist order may be issued by the SEC motu proprio, it being unnecessary that it results from a verified complaint from an aggrieved party. A prior hearing is also not required whenever the Commission finds it appropriate to issue a cease and desist order that aims to curtail fraud or grave or irreparable injury to investors. There is good reason for this provision, as any delay in the restraint of acts that yield such results can only generate further injury to the public that the SEC is obliged to protect.
>
> The act of selling unregistered securities would necessarily operate as a fraud on investors as it deceives the investing public by making it appear that respondents have authority to deal on such securities. Section 8.1 of the SRC clearly states that securities shall not be sold or offered for sale or distribution within the Philippines without a registration statement duly filed with and approved by the SEC and that prior to such sale, information on the securities, in such form and with such substance as the SEC may prescribe, shall be made available to each prospective buyer." (Emphasis supplied)

WHEREFORE, premises considered, **XIAN COINS (XNC)**; its owner and founder, **CHRISTIAN ALBERT SORIANO GAZA**; representatives, salesmen, solicitors, agents, uplines, enablers and influencers, and any and all persons claiming and acting for and in their behalf, are hereby directed to **IMMEDIATELY CEASE AND DESIST** from further engaging in, promoting and facilitating selling and/or offering for sale securities in the form of investment contracts and/or other activities/transactions, until the requisite registration statements are duly filed with and approved by the Commission, and the corresponding license and/or permit to offer/sell securities are issued.

XIAN COINS; its owner and founder, **CHRISTIAN ALBERT SORIANO GAZA**; representatives, salesmen, solicitors, agents, uplines, enablers and influencers, and any and all persons claiming and acting for

[25] G.R. No. 210316, November 28, 2016.

and in their behalf, are likewise directed to **CEASE** their internet presence relating to the transactions and investment scheme covered by this *Cease and Desist Order*. The Commission will institute the appropriate administrative and criminal action against any persons or entities found to act as solicitors, information providers, salesmen, agents, brokers, dealers or the like for and on their behalf.

Finally, the Commission hereby **PROHIBITS XIAN COINS** and **CHRISTIAN ALBERT SORIANO GAZA** its partners, operators, directors, officers, salesmen agents, representatives, promoters, and all persons, conduit entities and subsidiaries claiming and acting for and on its behalf from transacting any business involving the funds covered by this CDO in its depository banks, and from transferring, disposing, or conveying in any manner, all assets, properties, real or personal, including but not limited to bank deposits, of which the named persons herein may have any interest, claim or participation whatsoever, directly or indirectly, under its/their custody, to ensure the preservation of the assets for the benefit of the investors.

The EIPD of the Commission is hereby DIRECTED to cause (a) the posting of this Order in the Commission's website and (b) the publication of the same in a newspaper of general circulation as provided for under Section 4-2, Rule IV, Part I of the 2016 Rules.

The EIPD is FURTHER DIRECTED to submit a formal compliance report, by way of pleading, to the Commission *En Banc* WITHIN TEN (10) DAYS from receipt of this *Cease and Desist Order*.

Let a copy of this Cease and Desist Order be furnished to the Company Registration and Monitoring Department, Corporate Governance and Finance Department, and the Information and Communications Technology Department of this Commission, the Bangko Sentral ng Pilipnas, the Department of Trade and Industry, the National Privacy Commission, the Department of Information and Communications Technology, and the Securities and Exchange Commission, Thailand, for their information and appropriate action.

In accordance with the provisions of Section 64.3 of the SRC and Section 4-3 of the 2016 Rules of Procedure of the Commission, the parties subject of this CDO may file a verified motion to lift the CDO within five (5) days from receipt or from posting thereof. The Motion to Lift the CDO must be filed to the Commission En Banc through the Office of the General Counsel.

FAIL NOT UNDER PENALTY OF LAW.

SO ORDERED.

Pasay City, Philippines; 16 November 2021.

EMILIO B. AQUINO
Chairperson

EPHYRO LUIS B. AMATONG
Commissioner

JAVEY PAUL D. FRANCISCO
Commissioner

KELVIN LESTER K. LEE
Commissioner

KARLO S. BELLO
Commissioner